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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 323. 89

THE NEW YORK BELTING AND PACKING COMPANY, APPELLANT,

vs.

THE NEW JERSEY CAR SPRING AND RUBBER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MAY 12, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 25, 1889

1 United States Circuit Court, Southern District of New York.

To the honorable the judges of the circuit court of the United States for the second circuit, within and for the southern district of New York, sitting in equity:

The New York Belting and Packing Company, a corporation created by and under the laws of the State of Connecticut, bring this their bill against The New Jersey Car Spring and Rubber Company, a corporation created by and under the laws of the State of New Jersey.

And thereupon your orators complain and say:

I. That heretofore, to wit, prior to the twenty-seventh day of May, 1879, one George Woffenden, having theretofore invented a new and useful design for rubber mats, made application in due form of law to the Commissioner of Patents for letters patent of the United States for said design, and, having complied with the various requirements of law in such cases made and provided, the said George Woffenden was adjudged to be justly entitled to a patent under the law.

II. That the said George Woffenden, by assignment dated prior to the twenty-seventh day of May, 1879, duly assigned and transferred to your orators the full and exclusive right to all the said invention and improvement, as fully set forth and described in the specification prepared and executed preparatory to the obtaining of letters patent therefor, which said assignment was duly recorded in the Patent Office; and thereupon, on the twenty-seventh day of

2 May, 1879, letters patent for said design were issued to your orators in the name of the United States of America, under the seal of the Patent Office, signed by the acting Secretary of the Interior and countersigned by the Commissioner of Patents, and bearing date the twenty-seventh day of May, 1879, and numbered 11208, whereby there was granted to your orators, their successors or assigns, for the term of fourteen years from the twenty-seventh day of May, 1879, the exclusive right to make, use, and vend the said invention throughout the United States and the territories thereof, as by said letters patent or a certified copy thereof, ready to be produced as this court may direct, and to which your orators beg leave for greater certainty to refer, will more fully and at large appear.

III. That your orators have always since the grant of the said letters patent, and in the exercise of the full and exclusive liberty so granted as aforesaid, made, used, and vended to others to be used the said improvements so patented, and have had and maintained, until the infringement hereinafter complained of, exclusive possession of the said improvement and invention under and by virtue of said letters patent, and have never acquiesced in any invasion or infringement of their said rights, and the rights of your orators to the exclusive use and enjoyment of said invention as covered by said

letters patent and acquiesced in by the public has been generally respected.

IV. And your orators further show, upon information and belief, that the defendants herein, having full knowledge of the premises and in violation of your orators' exclusive rights and privileges as aforesaid, and utterly disregarding the same, have, since the 27th day of May, 1879, without the license of your orators, at the city of New York, in the said southern district of New York, and at Jersey City, in the State of New Jersey, and at various other places in the United States, manufactured, used, and sold rubber mats and similar articles of India rubber, each and every one of which con-
3 tains the design described in said letters patent and so secured to your orators; what quantity your orators are unable to say, but pray that the defendants may discover and set forth in their answer to this bill, and that the defendants are threatening to manufacture the said rubber goods in large quantities, and to supply the market therewith and to sell the same.

V. And your orators further show unto your honors that they will be subject to great and irreparable injury unless they shall obtain from your honors the relief hereby sought.

To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may, upon the corporal oath of one of their officers and according to the best and utmost of their knowledge, information, and belief, full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated and they thereunto distinctly interrogated, and more especially that they may answer and set forth—

1. Whether they have not made or caused to be made or used or sold rubber mats and similar articles of India rubber, containing the design set forth and shown in said letters patent No. 11208, since the 27th day of May, 1879, and what amount of such rubber goods they have so made or caused to be made or used or sold, according to the best of their knowledge, information, and belief, as nearly as they can approximate the same.

2. Whether they have not received money or property, directly or indirectly, from the manufacture, use, or sale, since the twenty-seventh day of May, 1879, of rubber mats and similar articles of India rubber embracing the design set forth and shown in said
4 letters patent No. 11208, and what amount of such money or property they have received or are entitled to receive from such manufacture, use, or sale.

And your orators pray that the said defendants may answer the premises, and may be decreed to account for and pay over to your orators all such gains and profits as have accrued to them from such infringement by making, using, and selling rubber mats and similar articles of India rubber containing the design covered by said letters patent, and also to pay to your orators, in addition to said profits, the damages which have been sustained by your orators by reason of said infringement, and that said damages may be increased

by the court after the same are assessed, and that the defendants may be restrained by a writ of injunction, issuing out of and under the seal of this honorable court, from making, using, or vending to others to be used any rubber mats or similar articles of India rubber containing the design described in said letters patent and embracing the design so secured to your orators as aforesaid, and also that an injunction shall issue restraining the defendants pending this cause, and for such other and further relief as the nature of the case may require and to your honors may seem meet.

May it please your honors to grant unto your orators not only a writ of injunction, conformably to the prayer of this bill, but also a writ of subpœna, directed to the said defendants, The New Jersey Car Spring and Rubber Company, commanding them to appear and answer to this bill of complaint, and to do and receive what to your honors may seem meet.

NEW YORK BELTING AND PACKING COMPANY,
[L. S.] By J. D. CHEEVER, *Deputy Treasurer.*

TURNER, LEE & McCLURE,
Complainants' Solicitors.
W. H. L. LEE, *Of Counsel.*

5 UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*
City and County of New York,

On this 27th day of March, 1887, before me, a notary public for the city and county of New York, personally appeared John D. Cheever, who, being duly sworn, did depose and say that he is the deputy treasurer of the complainant; that he has read the foregoing bill in equity and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true, and that the seal affixed to the said bill is the corporate seal of said complainant, and was by him affixed thereto by authority of said corporation.

[L. S.] VICTOR E. BURKE,
Notary Public, N. Y. Co.

6 Endorsed: U. S. circuit court, southern district of New York. The New York Belting & Packing Company *v.* The New Jersey Car Spring & Rubber Company. No. 2. Bill of complaint. Turner, Lee & McClure, solicitors for complainant, 20 Nassau —, New York, N. Y. U. S. circuit court. Filed Mar. 24, 1887. Timothy Griffith, clerk.

6½ (2–175.)

DEPARTMENT OF THE INTERIOR.

[Vignette.]

23280.

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the design letters patent granted New York Belting and Packing Company May 27th, 1879, number 11208, for design for rubber mats.

In testimony whereof I, M. V. Montgomery, Commissioner of Patents, have caused the seal of the Patent Office to be affixed this 6th day of December, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

Seal Patent Office, United States of America.

M. V. MONTGOMERY,
Commissioner.

7 No. 11208, design. (2–155.)

THE UNITED STATES OF AMERICA.

[Vignette.]

To all to whom these presents shall come:

Whereas George Woffenden, of Newtown, Connecticut, has presented to the Commissioner of Patents a petition praying for the grant of letters patent for an alleged new and useful design for rubber mats, he having assigned his right, title, and interest in said design to New York Belting and Packing Company, a description of which invention is contained in the specification, of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such case made and provided; and

Whereas, upon due examination made, the said claimant is adjudged to be justly entitled to a patent under the law:

Now, therefore, these letters patent are to grant unto the said New York Belting and Packing Company, its successors or assigns, for the term of fourteen years from the twenty-seventh day of May, one thousand eight hundred and seventy-nine, the exclusive right, to make, use, and vend the said invention throughout the United States and the territories thereof.

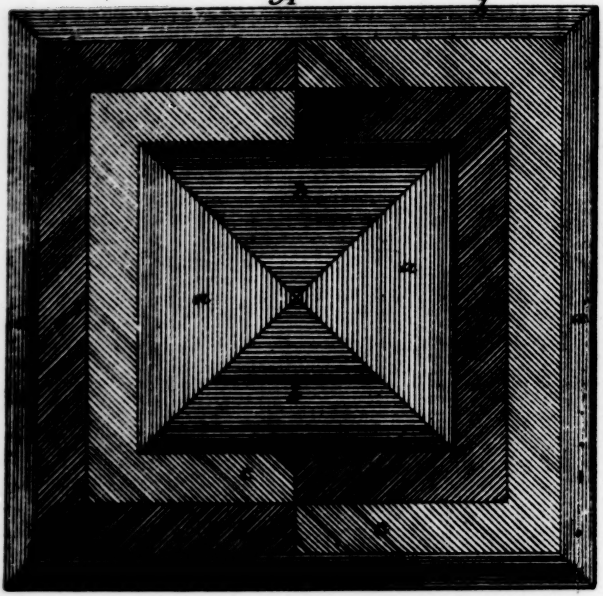
In testimony whereof I have hereunto set my hand and caused

DESIGN.

G. WOFFENDEN.

Rubber Mat.

No. 11,208. Patented May 27, 1879.



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Witnesses
E. A. Dick
C. H. Fredrick

Inventor
George Woffenden
by A. Pollok
his attorney

Seal Patent Office, United States of America.

the seal of the Patent Office to be affixed, at the city of Washington, this twenty-seventh day of May, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the one hundred and third.

A. BELL,
Acting Secretary of the Interior.

Countersigned:
H. E. PAINE,
Commissioner of Patents.

9 UNITED STATES PATENT OFFICE.

GEORGE WOFFENDEN, of Newtown, Connecticut, assignor to the New York Belting and Packing Company.

Design for a Rubber Mat.

Specification forming part of Design No. 11208, dated May 27, 1879; application filed March 4, 1879. (Term of patent, 14 years.)

To all whom it may concern:

Be it known that I, George Woffenden, of Newtown, in the county of Fairfield and State of Connecticut, have invented and produced a new and original design for rubber mats, of which the following is a full, clear, and exact description, reference being had to the accompanying drawing, making part of this specification.

(Here follows diagram marked p. 8.)

In accordance with this design the mat gives under the light different effects, according to the relative position of the person looking at it. If the person changes his position continuously the effects are kaleidoscopic in character. In some cases moire effects, like those of moire or watered silk, but generally mosaic effects, are produced. Stereoscopic effects also, or the appearance of a solid body or geometric figure, may at times be given to the mat, and under proper conditions an appearance of a depression may be presented.

The design consists in parallel lines of corrugations, depressions, or ridges arranged to produce the effects as above indicated.

The drawing represents a mat embodying this design.

A is a mat, which is, as represented, square, although it might be oblong or other desired shape. It is divided into a number of sections, *a b c d*, the corrugations or depressions and ridges in those represented by the same letter being parallel. Thus in the center and outer border formed by the sections *a b* the corrugations extend around the mat parallel with its outer edge and with each other. At the points where each depression crosses the diagonals drawn from corner to corner of the mat through the center it makes a right angle with its previous path. In the intermediate borders the corrugations in the sections *c* are arranged at an angle with those in

the sections *d*, and in both they form an angle with the corrugations in the sections *a b*. By the different shading of the sections attempt has been made to represent the mosaic effects produced, which, it will be understood, vary like a kaleidoscope as the observer shifts his position.

The above forms simply one of the many ways in which my invention may be carried into effect. The corrugations in the center and outer border need not extend entirely around the mat; but in each of the sections a depression in one section may be opposite a ridge in the next; and it is not necessary that the corrugations be parallel with the edges of the mat. They may run in any direction. The ridges and depressions in the intermediate borders might be made to form different angles with each other or with those in the other sections, or the borders might be increased or diminished in number. It will of course be understood that the effect produced and the manner in which the appearance varies are modified more or less by these changes. Instead of making the corrugations in the center of mat to bend four times, they may be made to change their line of direction any desired number of times in a regular or irregular way—that is to say, instead of having four series of parallel depressions and ridges, a number of series, less or more, arranged at various angles with each other, may be employed. I may divide the mat by a number of imaginary lines representing a projection of any geometrical figure, and in each of the sections so formed make parallel corrugations or alternate ridges and elevations, the different sets of corrugations making with each other the proper angle to give the effects sought for.

To give the moire effects I usually make the ridges and depressions undulating, while maintaining the parallel position with relation to each other. I desire, therefore, to have it understood that I do not intend to limit the design to parallel corrugations which are straight throughout any considerable portion of their length, (as represented on the drawing, for example,) but that it includes the undulating ridges and depressions, or other disposition or formation in which the corrugations alter their direction irregularly, or in which they may be straight for a certain distance and then formed in undulations, and that it includes the corrugations arranged in concentric circles, in spirals, in zigzags, or according to any desired figure.

Having thus described my invention, what I claim, and desire to secure by letters patent, is—

1. A design for a rubber mat, consisting of corrugations, depressions, or ridges in parallel lines, combined or arranged relatively, substantially as described, to produce variegated, kaleidoscopic, moire, stereoscopic, or similar effects, substantially as set forth.

2. A design for a rubber mat, consisting of a series of parallel corrugations, depressions, or ridges, the lines of the said corrugations being deflected at one or more points, substantially as set forth.

3. A design for a rubber mat, consisting of a series of parallel corrugations, depressions, or ridges arranged in sections, the general

line of direction of the corrugations in one section making angles with or being deflected to meet those of the corrugations in the contiguous or other sections, substantially as described.

In testimony whereof I have hereunto signed my name this 18th day of February, A. D. 1879.

GEORGE WOFFENDEN.

Witnesses:
D. O. GATELY.
W. W. PERKINS.

[Endorsed:] Design 11208.

11 Circuit Court of the United States, Southern District of New York.

NEW YORK BELTING AND PACKING COMPANY *vs.* NEW JERSEY CAR SPRING AND RUBBER COMPANY. } In Equity. No 2.

SIR: You will please enter our appearance as solicitors for the defendant, The New Jersey Car Spring and Rubber Company.

Yours, BRIESEN & STEELE,
No. 229 Broadway, New York City.

Dated 25th March, 1887.

To Timothy Griffith, clerk.

(Endorsed:) Circuit court U. S., so. dist. of New York.
12 New York Belting & Packing Co. *vs.* New Jersey Car Spring and Rubber Co. In equity. No. 2. Appearance. Briesen & Steele, sol's for def't, 229 Broadway, New York. U. S. circuit court. Filed March 25, 1887. Timothy Griffith, clerk.

13 Circuit Court of the United States, Southern District of New York.

NEW YORK BELTING AND PACKING COMPANY *vs.* NEW JERSEY CAR SPRING AND RUBBER COMPANY. } In Equity. Suit No. 2.

The demurrer of The New Jersey Car Spring and Rubber Company, defendant, to the bill of complaint of The New York Belting and Packing Company, complainant.

This defendant, by protestation, not confessing all or any of the matters in said complainant's bill of complaint contained to
14 be true in such manner and form as the same are therein set forth and alleged, does demur to said bill, and for cause of demurrer shows:

First. That it does not appear in and by said bill of complaint that the alleged new and useful design patented in and by said reissued letters patent No. 11280 was produced by said George Woffenden.

Second. That it does not appear in and by said bill of complaint that the alleged new and useful design patented in and by said design letters patent No. 11208 was invented and produced by said George Woffenden by his own industry, genius, efforts, and expense.

Third. That it appears on the face of the said design letters patent No. 11208, profert of which is made in said bill of complaint, that the Commissioner of Patents exceeded his jurisdiction in granting and issuing said design letters patent No. 11208.

Fourth. That it appears on the face of the said design letters patent No. 11208, profert of which is made in said bill of complaint, that said invention, if any such there may be, is not a design within the meaning of the act of Congress in such cases made and provided and cannot be protected by design letters patent therefor—that is to say, the alleged design is not "a new and original design for a manufacture, bust, statue, alto-relievo, or bas-relief;" nor a "new and original design for the printing of woolen, silk, cotton, or other fabrics;" nor a "new and original impression, ornament, patent, print, or picture to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture;" nor a "new, useful, and original shape *of* configuration of any article of manufacture."

Fifth. That it appears upon the face of said design letters
15 patent No. 11208, profert of which is made in said bill of complaint, that said invention, if any such there be, is not a design within the meaning of the act of Congress in such cases made and provided for which letters patent could lawfully issue, but is a method or means to be employed in producing various designs on rubber mats.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint (which the said defendant reserves the right to interpose and specify *ore tenus*), this defendant does demur thereto and to all the matters and things therein contained, and humbly prays the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

NEW JERSEY CAR SPRING AND RUBBER CO.,
By JNO. J. VOORHEES, *Sec'y, Defendant.*

BRIESEN & STEELE,
Solicitors for Defendant.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

John J. Voorhees, being duly sworn, deposes and says that he is the secretary of The New Jersey Car Spring and Rubber Company, the defendant in the above-entitled suit; that he has read the foregoing demurrer to the bill of complaint herein, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

JNO. J. VOORHEES.

Subscribed and sworn to before me this 25th day of March, 1887.
[L. S.] HARRY M. TURK,
Notary Public (111), *N. Y. County.*

16 I certify that in my opinion the foregoing demurrer of The New Jersey Car Spring and Rubber Company, defendant, to the bill of complaint of The New York Belting and Packing Company, complainant, is well founded in point of law and proper to be filed in the above-entitled cause.

ARTHUR V. BRIESEN,
Of Counsel of Defendant.

[Endorsed:] Circuit court U. S., so. dist. of New York. New York Belting and Packing Co. *vs.* New Jersey Car Spring and Rubber Co. In equity. No. 2. Demurrer. Briesen & Steele, sol's for def't, 229 Broadway, New York. U. S. circuit court. Filed Mar. 26, 1887. Timothy Griffith, clerk.

17 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the twenty-eighth day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The Honorable William J. Wallace, circuit judge.

THE NEW YORK BELTING AND PACKING COMPANY *vs.* THE NEW JERSEY CAR SPRING AND RUBBER COMPANY. } (Eq. Cal., Feb. T., '87.)

SAME *vs.* SAME.

The above causes coming on this day for argument upon demurrers to the bills, Mr. Arthur V. Breisen is heard in support of demurrers; Mr. Wm. H. L. Lee is heard in behalf of complainant.

(Demurrer overruled in suit No. 1. C. A. V. as to suit No. 2.)

18 United States Circuit Court, Southern District of New York.

THE NEW YORK BELTING & PACKING COMPANY *vs.* THE NEW JERSEY CAR SPRING & RUBBER COMPANY.

WALLACE, *J.:*

It is insisted by demurrer to the bill that the patent sued upon is invalid upon its face for want of novelty. In determining the question the court can only consider such familiar facts as fall within the category of those things of which judicial notice will be taken.

The patent is for a "design for a rubber mat." The patentee states in the description that "in accordance with the design the

mat gives under the light different effects, according to the relative position of the person looking at it. If the person changes his position continuously the effects are kaleidoscopic in character. In some cases moire effects, like those of moire or watered silk, but generally mosaic effects, are produced. Stereoscopic effects also, or the appearance of a solid body or geometric figure, may at times be given to the mat, and under proper conditions and appearance of a depression may be presented. The design consists in
19 parallel lines of corrugations, depressions, or ridges arranged to produce the effects as above indicated. I may divide the mat by a number of imaginary lines representing a projection of any geometrical figure, and in each of the sections so formed make parallel corrugations or alternate ridges and elevations, the different sets of corrugations making with each other the proper angle to give the effects sought for. To give the moire effects I usually make the ridges and depressions undulating, while maintaining the parallel position with relation to each other. I desire, therefore, to have it understood that I do not intend to limit the design to parallel corrugations which are straight throughout any considerable portion of their length, but that it includes the undulating ridges and depressions or other disposition or formation in which the corrugations alter their direction irregularly or in which they may be straight for a certain distance and then formed in undulations, and that it includes the corrugations arranged in concentric circles, in spirals, in zigzags, or according to any desired figure."

The claims are as follows:

"1. A design for a rubber mat, consisting of corrugations, depressions, or ridges in parallel lines, combined or arranged relatively, substantially as described, to produce variegated, kaleidoscopic, moire, stereoscopic, or similar effects, substantially as set forth.

2. A design for a rubber mat, consisting of a series of parallel corrugations, depressions, or ridges, the lines of the said corrugations being deflected at one or more points, substantially as set forth.

20 3. A design for a rubber mat, consisting of a series of parallel corrugations, depressions, or ridges arranged in sections, the general line of direction of the corrugations in one section making angles with or being deflected to meet those of the corrugations in the contiguous or other sections, substantially as described."

The patent is an attempt to secure to the patentee a monopoly of all ornamentation upon rubber mats by which variations of light and shade are produced by a series of ridges and depressions without regard to any particular arrangement or characteristics of the lines except that they are to be parallel. Although there is an illustration in the drawing, and although each claim is for a design "substantially as described," the language of the specification is carefully expressed so as not to restrict the claims to the design shown in the drawing, but so that the first claim shall include every variety which can be produced by the arrangement of corrugations, depressions, or ridges in parallel lines; the second, all obtainable when by the arrangement the corrugations are deflected, and the third, all ob-

tainable when by the arrangements of corrugations in sections those of one section make an angle with those in the contiguous or other sections.

It was not new to produce contrasts and variations in light and shade or stereoscopic effects by depressions or elevation in the surface of materials. It was old to do this by arranging them in parallel lines, as is wood, plaster, and corduroy cloth. It is not novelty which will sustain a design patent to transfer to rubber or to a rubber mat an effect or impression to the eye which has been
21 produced upon other materials or articles by contrast or variation of light and shade. The design of this patent is not new unless it embodies a new impression or effect produced by an arrangement or configuration of lines which introduces new elements of color or form. This is not claimed.

None of the claims can be limited to a design which produces any definite or concrete impression to the eye.

The demurrer is sustained.

(Endorsed:) United States circuit court, southern dist. of N. Y. The New York Belting & Packing Company *vs.* The New Jersey Car Spring and Rubber Company. Opinion. Wallace, J. U. S. circuit court. Filed Apr. 14, 1887. Timothy Griffith, clerk.

22 Circuit Court of the United States, Southern District of New York.

THE NEW YORK BELTING AND PACKING COMPANY *vs.* THE NEW JERSEY CAR SPRING AND RUBBER COMPANY. } In Equity. Suit No. 2.

Take notice that the annexed is a copy of the proposed decree we shall this day mail to his honor Judge William J. Wallace, at Syracuse, New York, with the request that he sign the same and send it to the clerk of this court to be filed and entered.

Respectfully, BRIESEN & STEELE,
Solicitors for Defendant.

Dated New York, April 15th, 1887.

To Turner, Lee & McClure, Esqs., solicitors for complainant.

23 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 19th day of April, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The Honorable William J. Wallace, circuit judge.

THE NEW YORK BELTING AND PACKING COMPANY *vs.* THE NEW JERSEY CAR SPRING AND RUBBER COMPANY. } In Equity. Suit No. 2. On Design Letters Patent No. 11208.

This cause coming on to be heard upon the bill of complaint

and the demurrer filed thereto by the defendant, and Mr. William H. L. Lee having been heard on behalf of the complainant, and Mr. Arthur V. Briesen having been heard on behalf of the defendant, now, therefore, upon consideration thereof, it is, on motion of Briesen & Steele, solicitors for the defendant, hereby—

Ordered, adjudged, and decreed that said demurrer be, and the same hereby is, sustained; and it is further ordered, adjudged, and decreed that said bill of complaint be, and the same
24 hereby is, dismissed with costs to the defendant, to be taxed by the clerk of this court, and that the defendant have execution therefor.

W. J. WALLACE.

(Endorsed:) Circuit court U. S., so. dist. of New York. The New York Belting and Packing Co. *v.* The New Jersey Car Spring and Rubber Co. In equity. Decree and notice of settlement. Briesen & Steele, sol'rs for def't, 229 Broadway, New York. Due service of a copy of the within papers is hereby admitted. 15th Ap'l, 1887. Turner, Lee & McClure, sol'rs for compl't. U. S. circuit court. Filed Ap'l 19th, 1887. Timothy Griffith, clerk.

25 U. S. Circuit Court, Southern District of New York.

THE NEW YORK BELTING AND PACKING COMPANY
vs.
THE NEW JERSEY CAR SPRING AND RUBBER COMPANY.

No. 2. In Equity. Ap'l Term, 1887.

From the final decree heretofore entered herein on the nineteenth day of April, 1887, at this term of said court, adjudging that the demurrer to the bill of complaint herein be sustained, and that said bill be dismissed with costs to the defendant, the said complainant, in open court, claims an appeal to the Supreme Court of the United States and gives good and sufficient security to answer all damages and costs if it fails to make its plea good; which said
26 security being approved by the said court said appeal is allowed accordingly.

Dated the 4th day of May, 1887.

ADDISON BROWN.

(Endorsed:) U. S. circuit court, southern district of New York. The New York Belting and Packing Company *vs.* The New Jersey Car Spring and Rubber Company. No. 2. Original appeal in open court. Turner, Lee & McClure, solicitors for appellant, 20 Nassau St., New York. We admit due service of a copy of the within appeal in open court this 5th day of May, 1887. Briesen & Steele. U. S. circuit court. Filed May 6th, 1887. Timothy Griffith, clerk.

27 Know all men by these presents that we, John H. Cheever, of the city and county of New York, and Ebenezer Roby, of

Brooklyn, county of Kings, are held and firmly bound unto the New Jersey Car Spring and Rubber Company, a corporation incorporated by and under the laws of the State of New Jersey, in the sum of two hundred and fifty dollars, to be paid to the said New Jersey Car Spring and Rubber Company, its successors, legal representatives, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the fourth day of May, 1887.

28 Whereas, at a circuit court of the United States within and for the southern district of New York, in a suit in equity pending in said court between The New York Belting and Packing Company, complainant, and The New Jersey Car Spring and Rubber Company, defendant, a decree was rendered against the said complainant; and the said complainant having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation having been issued directed to said New Jersey Car Spring and Rubber Company, citing and admonishing it to be and appear at the October term, 1887, of the Supreme Court of the United States to be held at Washington, to wit, on the second Monday of October, 1887:

29 Now, therefore, the condition of the above obligation is such that if the said The New York Belting and Packing Company shall prosecute its said appeal to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

JOHN H. CHEEVER. [L. S.]
EBENEZER ROBY. [L. S.]

In the presence of—
M. T. DWYER.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On this fourth day of May, 1887, before me personally came John H. Cheever and Ebenezer Roby, to me known and known to me to be the individuals described in and who executed the foregoing bond, and they severally acknowledged to me that they executed the same.

30 M. T. DWYER,
[L. S.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

On this fourth day of May, 1887, before me personally came John H. Cheever, to me known, and, being by me duly sworn, did depose and say that he resides at New York, N. Y.; that he is worth the

sum of five hundred dollars and upwards, besides property exempt by law from execution and over and above all his debts and liabilities, and is a freeholder in the State of New York.

M. T. DWYER,
Notary Public, Kings Co.

[L. S.]

Cert. filed in N. Y. Co.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

On this fourth day of May, 1887, before me personally
31 came Ebenezer Roby, to me known, and, being by me duly sworn, did depose and say that he resides in Brooklyn, New York; that he is worth the sum of five hundred dollars and upwards, besides property exempt by law from execution and over and above all his debts and liabilities, and is a freeholder in the State of New York.

M. T. DWYER,
Notary Public, Kings Co.

[L. S.]

Cert. filed in N. Y. Co.

The foregoing bond is approved this 4th day of May, 1887.

ADDISON BROWN.

(Endorsed:) U. S. circuit court, southern district of New York. The New York Belting and Packing Company *vs.* The New Jersey Car Spring and Rubber Company. No. 2. Bond on appeal. Turner, Lee & McClure, solicitors for appellant, 20 Nassau street
32 New York. U. S. circuit court. Filed May 4, 1887. Timothy Griffith, clerk.

33 By the Hon. Addison Brown, one of the judges of the circuit court of the United States for the southern district of New York.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

To the New Jersey Car Spring and Rubber Company, Greeting:

Whereas from the whole of the decree lately made by the circuit court of the United States for the southern district of New York in a certain case wherein The New York Belting and Packing Company was complainant and The New Jersey Car Spring and Rubber Company was defendant the said complainant has appealed to the Supreme Court of the United States, and has taken its appeal
34 in open court, and has given good and sufficient security to prosecute its said appeal to effect and answer all damages and costs.

Therefore you are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washing-

ton on the second Monday of October, 1887, pursuant to said appeal, to show cause, if any there be, why the decree so appealed from as aforesaid should not be corrected and reversed and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Addison Brown, judge of said circuit court, at the city of New York, on this 4th day of May, 1887.

ADDISON BROWN.

(Endorsed:) U. S. circuit court, southern district of New
35 York. The New York Belting and Packing Company *vs.* The New Jersey Car Spring and Rubber Company. No. 2. Citation on appeal. Turner, Lee & McClure, solicitors for appellant, 20 Nassau street, New York. We admit due service of a copy of the within citation on appeal this 5th day of May, 1887. Briesen & Steele. U. S. circuit court. Filed May 6th, 1887. Timothy Griffith, clerk.

36 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to thirty-five, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The New York Belting and Packing Company, complainant & appellant, against The New Jersey Car Spring and Rubber Company, defendant & appellee, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York in the second circuit, this 10th day of May, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the said United States the one hundred and eleventh.

TIMOTHY GRIFFITH, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 323. The New York Belting and Packing Company, appellant, *vs.* The New Jersey Car Spring and Rubber Company. Filed May 12, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 39.

THE NEW YORK BELTING & PACKING COMPANY,

Appellant,

vs.

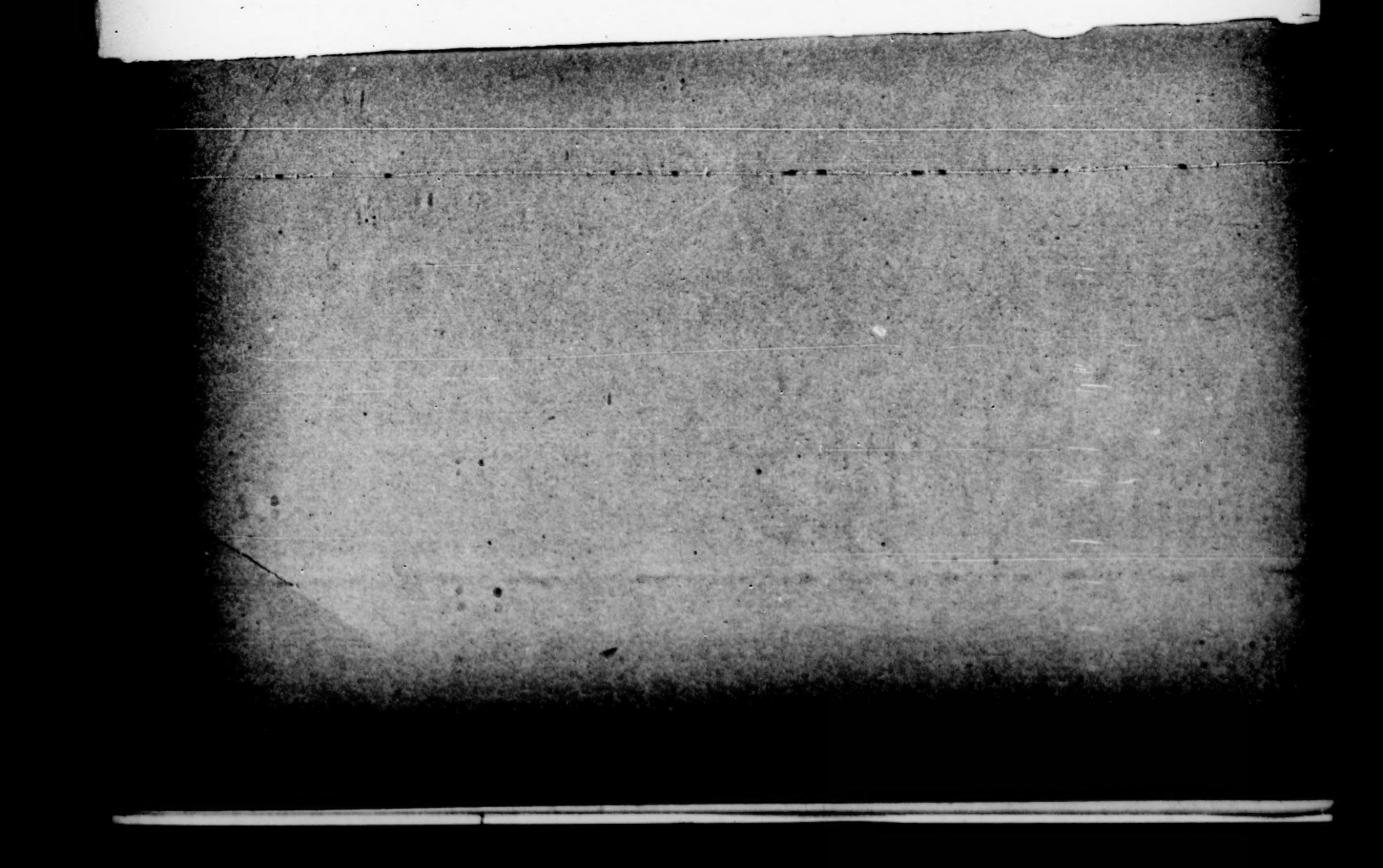
THE NEW JERSEY CAR SPRING AND RUBBER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

B. F. LEE,
WM. H. L. LEE,
Of Counsel.

C. G. Burgoyne, 146-150 Centre Street, N. Y.



Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 39.

THE NEW YORK BELTING AND PACKING COMPANY,

APPELLANT,

vs.

THE NEW JERSEY CAR SPRING AND RUBBER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from a final decree of the Circuit Court of the United States for the Southern District of New York, Judge WALLACE presiding, sustaining a demurrer and dismissing a bill in equity in a suit brought for infringement of letters patent granted to the New York Belting and Packing Company, as assignee of George Woffenden, May 27, 1879, No. 11,208, for a design for rubber mats. The bill was filed March 24, 1887 (page 3). The final decree sustaining the demurrer and dismissing the bill was entered April 19, 1887 (page 12).

Assignment of Errors.

The appellant specifies the various errors upon which it relies and in regard to which the decree is alleged to be erroneous :

1st. In that the Court below decreed that the design forming the subject matter of the first claim of said Letters Patent No. 11,208 is not patentable under the Laws of the United States relating to design patents.

2d. In that the Court below decreed that the design forming the subject matter of the second claim of said Letters Patent No. 11,208 is not patentable under the Laws of the United States relating to design patents.

3d. In that the Court below decreed that the design forming the subject matter of the third claim of said Letters Patent No. 11,208 is not patentable under the Laws of the United States relating to design patents.

4th. That in respect to each of said claims the Court below erred in holding that the subject matter of each and every of said claims was so old and familiar that it was matter of common knowledge, of which the Court could take judicial notice, that the public use of the said design antedated the plaintiff's invention.

5th. That the Court erred in dismissing the complainant's bill and in not overruling the defendant's demurrer, and in not assigning it to answer the bill.

Brief of the Argument.

The subject matter involved in the present litigation is of very considerable pecuniary value, and most of the questions presented by this case have never been passed upon by this Court and have been the subject of conflicting decisions by the Circuit Courts and by successive Commissioners of Patents.

Statutory Provisions.

This patent was issued under section 4,929 of the Revised Statutes, which is as follows:

"Any person who, by his own industry, genius' efforts, and expense, has invented and produced any new and original *design for a manufacture*, bust, statue, alto-relievo, or bas-relief; any new and original design for the printing of woolen, silk, cotton, or other fabrics; any new and original *impression, ornament*, patent, print, or picture to be printed, painted, cast, or otherwise *placed on or worked into any article of manufacture;* or any new, *useful*, and original *shape or configuration* of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication, may, upon payment of the fee prescribed, and other due proceedings had the same as in cases of inventions or discoveries, obtain a patent therefor."

In the construction of this section of the Revised Statutes and of similar previous laws, a number of questions have arisen and remain unsettled.

1st. What is the degree of invention requisite to support a patent for a design?

2d. What is the meaning of the word "useful" in the statute?

3d. Can there be a generic claim in a design patent in the sense in which that term is used in patents for an art, machine, manufacture or composition of matter or an improvement thereof?

4th. What is the test of novelty in respect to a design patent?

Decisions of the Supreme Court.

Design patents were construed by the Supreme Court of the United States in the following cases:

The Gorham Manufacturing Co. vs. White, 14 Wallace, 511. This case involved a design for the handles

of tablespoons and forks; the designs are reproduced on page 521 of the report; they appear very simple, but it was taken for granted by the Court that their production involved sufficient invention to support a design patent.

Lehnbeuter vs. Holthaus, 105 U. S., 94, involved a design patent for show cases. The Court below had dismissed the bill because "said letters patent were not good and valid in law." But the Supreme Court reversed this decision and sustained the validity of the patent, saying (page 96):

"The design patented by the complainants differs essentially from any other which has been called to our attention. It is not covered by the other patents which are set out in the record. Whether it is more graceful or beautiful than older designs is not for us to decide. It is sufficient if it is new and useful.

"The patent is *prima facie* evidence of both novelty and utility and neither of these presumptions has been rebutted by the evidence; on the contrary, they are strengthened. No anticipation of design is shown, although the attempt has been made to prove anticipation. *The fact that it has been infringed by defendants is sufficient to establish its utility, at least as against them.*"

Dobson vs. Hartford Carpet Co., 114 U. S., 439, involved designs for carpets. The question of novelty did not come up. The Court, however, held that it was competent for the Patent Office to grant a patent for an entire design, with a claim for each one of the constituent members of it, leaving the novelty of the whole and of each part, and the validity of the patent, open to contestation. "The mere joinder of such claims in one grant does not *per se* invalidate the patent or any particular claim at the option of a defendant" (p. 446).

Dobson vs. Dornan, 118 U. S., 10. This case also involved a design for a carpet. No question of novelty was involved. The objection that the patent was void on its face, for want of a sufficient description and claim, was overruled.

Clark vs. Bousfield, 10 Wallace, 183. This case was held not to involve a design, although the subject of design patents was incidentally discussed.

Degree of Invention Required.

The general principle to be deduced from these decisions would seem to be that in the case of a design patent, where the design is new and useful, the Court will not enter into any very subtle inquiry as to how far the creative or inventive faculty has been exercised. It is the *combination* that is new in nearly all cases of design (*Holdsworth vs. McCrea*, L. R., 2 H. L., 380). The law contemplates that the design shall be incorporated in, and made a part of, some article of manufacture, and the patent is granted for the design embodied in the article, and not for the design abstractly. Thus birds, trees, flowers, and a thousand familiar objects in nature and art, constitute essential parts of patented designs when so incorporated in a commercial article.

The Meaning of the Word "Useful."

As to the meaning of the word "useful" in the statute, the decisions of the Commissioners of Patents and of the Courts are at variance. Commissioner Fisher elaborately maintained the proposition that the word useful, in the statute, was to be used in its ordinary sense, and that where utility was the result of shape or configuration, or resulted from anything else specified in the statute, a design patent could be had, based upon the idea of utility alone, without regard to beauty (*Ex parte* Bartholomew, Commissioners' Decisions, 1869, p. 103; Fenton's Design Pat. Cases, p. 229). This case was distinctly overruled by Commissioner Leggett (*Ex parte* Parkinson, Commissioners' Decisions, 1871, p. 251; Fenton, 257). Afterwards Bartholomew's case was

approved by Commissioner Payne and Parkinson's case disapproved (*Ex parte* Shoeninger, 15 O. G., 384; Fenton, 301). And then again Commissioner Hall (*Ex parte* Schultze-Berge, 42 O. G., 293; Fenton, 324), approved Parkinson's case and held that the true definition of the word "useful" was "pleasing to the eye."

The meaning of the word useful in this statute, and in the preceding statutes upon the same subject, has also been considered by the Circuit Court in *Theberath vs. Rubber Co., 15 Fed. Rep., 246* (see also *Magic Ruffle Co. vs. Douglas, 2 Fisher, 330 and 336*, which arose on a patent for a new manufacture and not for a design).

Generic or Broad Claims.

In the Bartholomew case, above cited, Commissioner Fisher held, that there could be a generic or broad claim in a patent for a design (Fenton, p. 229; Com. Dec., 1869, p. 103). This doctrine was disapproved by Hall, Commissioner, in *ex parte* Gerard, 43 O. G., 1235, Fenton, p. 333; also 43 O. G., 1240, Fenton, 346.

In one of the earliest design patent cases reported, *Booth vs. Garelly, 1 Blatch., 247*, Mr. Justice Nelson was evidently of the opinion that a generic claim could be sustained. The views of Commissioner Fisher are so convincingly expressed in favor of generic claims, that we need only refer the Court particularly to his opinion in the Bartholomew case (Fenton, pp. 231-234).

Test of Novelty.

In ordinary patents it is generally assumed that the test of novelty is substantially the same as the test of infringement, and that in order to anticipate a patent something must be shown, which, if it had not been older than the patent, would have been an infringe-

ment thereof. If this principle be applied in the case of a design patent, the case of the *Gorham Manufacturing Co. vs. White, 14 Wallace, 511*, would be conclusive, for there it is held, that

"it is not essential to identity of design that the appearance should be the same to the eye of an expert; if in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same; if the resemblance is such as to deceive such an observer, sufficiently to induce him to purchase one, supposing it to be the other, the one first patented is infringed by the other."

It would thus seem to follow that a design patent could be anticipated by something that could be distinguished by an expert but would appear identical to the ordinary observer, *but probably this is subject to qualification.*

Summary of the Law.

Our conclusions in respect to these four propositions are as follows:

1. That every design that is not a copy of some pre-existing thing involves the exercise of imagination or fancy, and thus involves the exercise of creative or inventive faculty within the meaning of the law.

2. That there is no reason for giving the word "useful" in the statute any meaning outside of its ordinary meaning. Webster defines useful as follows:

"Full of use, advantage or profit; producing, or having power to produce, good; helpful toward advancing any purpose; beneficial; profitable; as, vessels and instruments useful in a family; books useful for improvement; useful knowledge; useful arts."

Under this view a design patent could be sustained either on the ground of beauty or on the ground of functional utility, and such is the view that we take of

the matter. Such was the English view under a former statute containing the word "utility" (*Rogers vs. Driver*, 16 Ad. and El., 102).

3. We see no reason why a generic claim cannot exist in the case of a design patent, and no reason why a patentee should be confined, where the state of the art allows it, to the specific thing which he has shown in its exact form; for, even if the impression of beauty is alone to be regarded, there is no reason why that should not often depend upon some generic principle embodied in the design, to which the pleasing emotion is due, apart from the special form in which it happens to be embodied in the particular case; but, on the other hand, we submit, that the state of the art might often narrow a claim intended to be generic, so as to bring it down to the specific matter shown.

4. We think that the test of novelty in respect to a design patent is substantially similar to the test of infringement laid down in *Gorham Manufacturing Co. vs. White, with this qualification*, that a second design might be the subject of a valid patent, by reason of its differences from the older design, although those differences could only be appreciated by a person of cultivated taste. Such a patent would, of course, be very narrow.

The Bill, including the Patent, and the Demurrer.

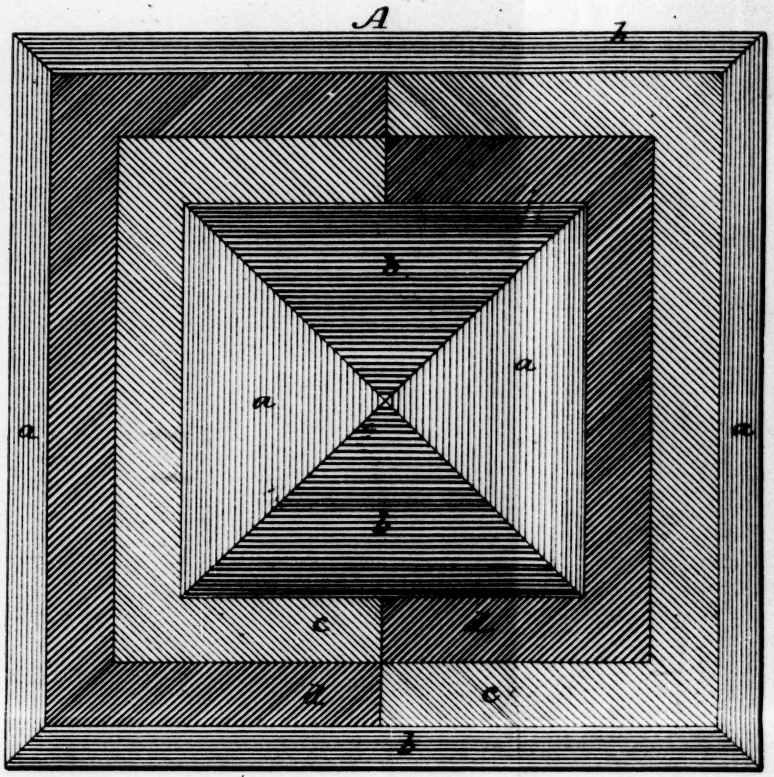
The bill in this case (page 1) alleges that Woffenden having invented "a new and useful design for rubber mats," made application in due form of law for letters patent therefor, and was adjudged to be justly entitled to a patent under the law. It also alleges the assignment of the improvement to the plaintiffs, the grant of the patent, bearing date May 27, 1879, and makes *profert* of a certified copy thereof. It also alleges that the plaintiffs have made, used, and vended to others to be used, the improvement in question, and that their right to the exclusive use and enjoyment of said inven-

DESIGN.

G. WOFFENDEN.

Rubber Mat.

No. 11,208. Patented May 27, 1879.



Witnesses

E. A. Dick

C. J. Fennick

Inventor

George Woffenden

by A. Pollok

his attorney

tion, as covered by said letters patent and acquiesced in by the public, has been generally respected. It also alleges that the defendants have infringed the patent by the sale of rubber mats and similar articles of india-rubber, and that they are "threatening to manufacture the said rubber goods in large quantities and to supply the market therewith and to sell the same." The letters patent forming part of the bill are set forth at page 4. The drawing in the printed record is on a reduced scale, and therefore does not serve to show the design as distinctly or as advantageously as it is shown in the Patent Office drawing. A specimen of a rubber mat made under the patent will be exhibited to the Court on the argument.

The letters patent are stated to be for a "new and useful design for rubber mats" in the granting part of the patent, and in the specification the title is "a new and original design for rubber mats." The specification is as follows (p. 5):

"TO ALL WHOM IT MAY CONCERN:

"Be it known that I, George Woffenden of Newtown, in the County of Fairfield and State of Connecticut, have invented and produced a new and original design for rubber mats, of which the following is a full, clear and exact description, reference being had to the accompanying drawing, making part of this specification.

"In accordance with this design the mat gives under the light different effects, according to the relative position of the person looking at it. If the person changes his position continuously the effects are kaleidoscopic in character. In some cases moire effects, like those of moire or watered silk, but generally mosaic effects, are produced. Stereoscopic effects also, or the appearance of a solid body or geometric figure, may at times be given to the mat, and under proper conditions an appearance of a depression may be presented.

"The design consists in parallel lines of corrugations, depressions or ridges arranged to produce the effects as above indicated.

"The drawing represents a mat embodying this design.

"A is a mat, which is, as represented, square, although it might be oblong or other desired shape. It is divided into a number of sections, *a*, *b*, *c*, *d*, the corrugations or depressions and ridges in those represented by the same letter being parallel. Thus, in the centre and outer border formed by the sections *a*, *b*, the corrugations extend around the mat parallel with its outer edge and with each other. At the points where each depression crosses the diagonals drawn from corner to corner of the mat through the centre it makes a right angle with its previous path. In the intermediate borders the corrugations in the sections *c* are arranged at an angle with those in the sections *d*, and in both they form an angle with the corrugations in the sections *a*, *b*. By the different shading of the sections attempt has been made to represent the mosaic effects produced, which, it will be understood, vary like a kaleidoscope as the observer shifts his position.

"The above forms simply one of the many ways in which my invention may be carried into effect. The corrugations in the centre and outer border need not extend entirely around the mat; but in each of the sections a depression in one section may be opposite a ridge in the next; and it is not necessary that the corrugations be parallel with the edges of the mat. They may run in any direction. The ridges and depressions in the intermediate borders might be made to form different angles with each other or with those in the other sections, or the borders might be increased or diminished in number. It will, of course, be understood that the effect produced and the manner in which the appearance varies are modified more or less by these changes. Instead of making the corrugations in the centre of mat to bend four times, they may be made to change their line of direction any desired number of times in a regular or irregular way, that is to say, instead of having four series of parallel depressions and ridges, a number of series, less or more, arranged at various angles with each other, may be employed. I may divide the mat by a number of imaginary lines representing a projection of any geometrical figure, and in each of the sections so formed make parallel corrugations or alternate ridges and elevations, the different sets of corruga-

tions making with each other the proper angle to give the effects sought for.

"To give the moire effects I usually make the ridges and depressions undulating, while maintaining the parallel positions with relation to each other. I desire, therefore, to have it understood that I do not limit the design to parallel corrugations, which are straight throughout any considerable portion of their length (as represented on the drawing, for example), but that it includes the undulating ridges and depressions, or other disposition or formation in which the corrugations alter their direction irregularly, or in which they may be straight for a certain distance and then formed in undulations, and that it includes the corrugations arranged in concentric circles, in spirals, in zigzags, or according to any desired figure.

"Having thus described my invention, what I claim and desire to secure by letters patent is :

"1. A design for a rubber mat, consisting of corrugations, depressions or ridges in parallel lines, combined or arranged relatively, substantially as described, to produce variegated, kaleidoscopic, moire, stereoscopic or similar effects, substantially as set forth.

"2. A design for a rubber mat, consisting of a series of parallel corrugations, depressions or ridges, the lines of the said corrugations being deflected at one or more points, substantially as set forth.

"3. A design for a rubber mat, consisting of a series of parallel corrugations, depressions or ridges arranged in sections, the general line of direction of the corrugations in one section making angles with or being deflected to meet those of the corrugations in the contiguous or other sections, substantially as described.

"In testimony whereof, I have hereunto signed my name this 18th day of February, A. D. 1879.

"GEORGE WOFFENDEN."

Witnesses :
D. O. GATELY,
W. W. PERKINS,
(Endorsed :) Design 11,208.

The defendant demurred to the bill on different grounds, as follows (p. 7) :

"FIRST. That is, does not appear in and by said bill of complaint that the alleged new and useful design

patented in and by said reissued Letters Patent No. 11,208, was produced by said George Woffenden.

"SECOND. That it does not appear in and by said bill of complaint that the alleged new and useful design patented in and by said design Letters Patent No. 11,208 was invented and produced by said George Woffenden by his own industry, genius, efforts and expense.

"THIRD. That it appears on the face of the said design Letters Patent No. 11,208, profert of which is made in said bill of complaint, that the Commissioner of Patents exceeded his jurisdiction in granting and issuing said design Letters Patent No. 11,208.

"FOURTH. That it appears on the face of the said design Letters Patent No. 11,208, profert of which is made in said bill of complaint, that said invention, if any such there may be, is not a design within the meaning of the Act of Congress in such cases made and provided, and cannot be protected by design letters patent therefor; that is to say, the alleged design is not 'a new and original design for a manufacture, bust, statue, alto-relievo, or bas-relief;' nor a 'new and original design for the printing of woolen, silk, cotton, or other fabrics;' nor a 'new and original impression, ornament, patent, print, or picture to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture;' nor a 'new, useful and original shape of configuration of any article of manufacture."

"FIFTH. That it appears upon the face of said design Letters Patent No. 11,208, profert of which is made in said bill of complaint, that said invention, if any such there be, is not a design within the meaning of the Act of Congress in such cases made and provided, for which letters patent could lawfully issue, but is a method or means to be employed in producing various designs on rubber mats."

The Court sustained the last three grounds of demurrer. The opinion is printed on pages 9, 10 and 11 of the record, and is reported in 30 Fed. Rep., 785, Fenton, p. 54.

THE COURT ERRED IN HOLDING THAT THE PATENT WAS VOID UPON ITS FACE, FOR WANT OF NOVELTY.

The summary mode of disposing of this case, adopted by the learned Judge in the Court below, could only be

justified upon this principle, that it is not conceivable that a state of facts could possibly be proved that would show or tend to show that the design for a rubber mat shown in the drawing and described in the specification, is new, original or useful, and this, too, notwithstanding the principle laid down in *Lehnbeuter vs. Holthaus, 105 U. S., 94*, above quoted (p. 4 of this brief).

If it may possibly turn out that *any one* of the claims is good, the demurrer must be overruled; for *non constat* but that the complainant may prove infringement of the particular claim that is good and ignore the rest. If he pursues this course it is not open to the defendant to contest the other claims for the purpose of disclaimer and costs (*Bell Tel. Co. vs. Spencer*, 8 F. R., 509; *Munday vs. Lidgerwood Co.*, 20 F. R., 191).

Nature of the Invention.

Let us consider the object sought to be attained by the invention.

A door-mat is put to such a use as to render it by no means an attractive object, and yet, from its very nature, it must be conspicuously displayed; it obtrudes itself upon the eye of the visitor.

A sheet of soft india-rubber is a most unattractive looking object; its color is not pleasing, it is dull and utterly incapable of receiving polish. It is very different from hard rubber, otherwise called vulcanite, which is a beautiful substance, resembling ebony and capable of receiving a high polish.

Sheets of soft vulcanized rubber possess, however, properties peculiarly adapting them to use as door-mats, and the problem presented was to contrive some way of making the surface pleasing to the eye, and at the same time useful and effective for the purpose of cleaning the shoes of the visitor. The result of Woffenden's efforts was the production of the design shown in the drawing accompany-

ing his patent, which has proved in practice to be a most useful and valuable article of manufacture; useful because of its shape, attractive to the public and having a great sale.

If the suit had not been disposed of so summarily and in utter disregard of the rule laid down by this Court in *Lehnbeuter vs. Holthaus* (105 U. S., 94, 96-97) it would have appeared by evidence, that by the mode adopted by the patentee in arranging his corrugations in parallel lines, in patterns or sections, whereby the directions of the parallel lines have angles to each other, the mat not only presents all the pleasing appearances to the eye, which are set forth in the patent, but other elements of beauty and also great resulting utility when in use, on account of the varying angles at which the shoes of the user must necessarily strike the various elastic and yielding ridges. The shoes are thus cleansed without requiring the shoes to be wiped in any one direction, and without attention on the part of the user.

It would have appeared also by the evidence that the principle adopted by the patentee, gave to the thing shown in the drawing of the patent, a commercial value that caused it to have a much readier sale and at a higher price than other door-mats made of the same substance.

The patentee need not specify the advantages of his invention in his patent. He is entitled to the benefit of every advantage that his invention in fact possesses, even though unknown to him when the patent issued, whether for the purpose of proving the patentability of his device or for purposes of enjoyment (*Brown vs. The District of Columbia*, 130 U. S., 87, 100; *Stowe vs. The City of Chicago*, 104 U. S., 547; *Roberts vs. Ryer*, 91 U. S., 157).

Who can say what other facts might have been brought forward, to show that this door-mat, shown in this particular drawing, was not only new and useful, in

the sense of the patent law, but even far removed from the boundary line of patentability?

The Claims.

Since the case of *Dobson vs. Hartford Carpet Co.*, 114 U. S., 446, it can no longer be questioned that a design patent can have a number of claims (see also *Miller vs. Smith*, 18 O. G. 1047, 5 F. R. 359, Fenton 157).

The Third Claim.

The patentee was at least entitled to be protected in his exclusive right to the use of the exact thing shown in the drawing of his patent and described in the specification by reference thereto.

The third claim of the patent *is a narrow claim*, embodying *the exact construction shown in the drawing*, as will be seen from its wording, which is as follows (p. 6):

"3. A design for a rubber mat, consisting of a series of *parallel corrugations*, depressions, or ridges *arranged in sections*, the general line of direction of the corrugations in one section *making angles with or being deflected to meet* those of the corrugations in the contiguous or other sections, *substantially as described.*"

Keeping in mind the principle laid down in *Gorham Manfg. Co. vs. White*, that claim could only be anticipated by the exhibition of something that had prior existence, and that was so nearly like the thing exhibited in the patent drawing and described in the specification, in respect to all the features claimed in the third claim, that an ordinary purchaser would mistake one article for the other. Which of us can say, as a matter of definite memory, that he ever saw any article, containing the special features enumerated in

the third claim, shown in the drawing and described in the specification?

We have spoken of the third claim first, because it is the narrowest claim and the one which was evidently intended to cover the precise configuration shown in the drawing.

The Second Claim.

Let us consider in like manner the second claim. It is as follows:

"2. A design for a rubber mat, consisting of a *series of parallel corrugations*, depressions or ridges, the lines of the said corrugations being *deflected* at one or more points, *substantially as set forth*."

This claim, as we will show, is narrower than the first claim and broader than the third claim, in that it does not require the corrugations to be arranged in sections. It is a claim for a part or modification of the design. It covers a design for a rubber mat, consisting of a series of parallel corrugations, the lines of the corrugations being deflected at one or more points, substantially as shown in the drawing and specification; and the claim is aptly worded to protect the patentee against an imitation, which, instead of having the corrugations divided off into definite sections as described in the third claim and shown in the drawing, produces a similar effect by having the parallel lines of corrugations deflected.

Thus the infringer would be prevented from availing himself of the utility and beauty of the design by an unsubstantial variation.

The First Claim.

Let us consider in like manner the first claim. It is as follows (p. 6):

"1. A design for a rubber mat, consisting of corru-

gations, depressions or ridges in parallel lines, combined or arranged relatively, substantially as described, to produce variegated, kaleidoscopic, moire, stereoscopic, or similar effects, substantially as set forth."

The construction of this claim depends upon the question, which is a new one in this Court, as to whether a design patent admits of generic claims. If the law is that a design patent does not admit of generic claims, then the true construction of this claim is as follows: It covers a design for a rubber mat, consisting of corrugations, depressions or ridges in parallel lines, combined or arranged relatively as shown in the specification and illustrated by the concrete form shown in the drawing, so as to produce variegated, kaleidoscopic, moire, stereoscopic or similar effects, substantially as embodied in the specification and drawing.

If on the other hand this Court shall decide that a generic claim can be sustained in a design patent, then the claim is well and aptly drawn, provided the inventor, in the configuration of this particular article, has discovered a principle, whereby peculiar beauty and peculiar utility can be given to the unpromising subject matter of a soft rubber door-mat. And who can say in advance, that the evidence would not make it clear that the patentee had discovered something useful and valuable in the sense of the design patent law, which could be applied in varying forms, but according to a set principle, which he had been fortunate enough to first discover and apply?

A Patentee is Confined to what He Formally Claims.

A fundamental error made by the Court below consisted of a disregard of the principles laid down in this Court in late cases concerning the *vast importance of the claims as contrasted with the body of the specification.*

It has been settled by repeated decisions of this Court that *although a claim can be narrowed it can never be enlarged by reference to the specification.* The learned Judge in the Court below, for the purpose of enlarging the claims so as to bring them within the scope of his supposed old objects of judicial notice, expressly refers to the specification. He says (page 10): "*Although* there is an *illustration in the drawing* and although *each claim is for a design substantially as described,* the language of the specification is carefully expressed, so as not to restrict the claims to the design shown in the drawing," etc.

For present purposes, it would perhaps be enough to say, that the broad language of the specification would naturally not relate to all the claims, but only to the broadest of them, leaving the others unaffected by the statement.

It very commonly happens, in the course of an application at the Patent Office, that the patentee prepares his specification under the supposition that his invention is of the broadest and most far-reaching character, and he makes his claims under the same supposition. On the Patent Office rejecting his claims and pointing out in what respect they are too broad, an amendment will be prepared simply changing the language of the claims, leaving the specification untouched. So, too, it has always been a common practice for the inventor to point out in his specification, what he supposes to be equivalents of his invention, as specifically stated in his claims. This is done sometimes by stating that such and such things "would be the equivalents of the specific construction that I have described and claimed;" or sometimes it takes the form, similar to the present instance, of saying, "I do not confine myself to the particular structure shown in my drawings and specified in my claims," stating some generic class which the inventor thinks himself entitled to cover. In each of these cases the patentee has done nothing but *suggest* to the public

what in his opinion are equivalents of the things claimed. Words of this class so inserted in the specification can do neither good nor harm to the patent; he is *bound at last* by the *language of his claims* and he cannot resort to the specification to enlarge them.

This very point has been recently decided by Judge GRESHAM in *Brush El. Co. vs. Fort Wayne El. L. Co.*, 40 F. R., 826, where it was held that where a patentee describes certain mechanism in his specifications and then declares that he does not limit himself to such mechanism, or its equivalent, but refers in his claim to the mechanism "substantially as shown," he need not disclaim the broad language of the specification in order to validate his patent, since the scope of the patent is measured by the terms of the claim, and the general statement in the specifications is *mere surplusage*.

This view is supported by *Railroad Co. vs. Mellon*, 104 U. S., 112, and by *Yale Lock Co. vs. Greenleaf*, 117 U. S., 554.

In *R. R. Co. vs. Mellon*, it is distinctly held, that "the scope of letters patent must be limited to the invention covered by the *claim*, and the latter cannot be enlarged by the language used in other parts of the specification." And at page 118 the Court says: "In this case the description of the appellee's invention is much broader than his claim. * * * He cannot go beyond what he has claimed, and insist that his patent covers something not claimed, merely because it is to be found in the descriptive part of the specification."

Tested by these rules, the claims of the patent in question are entirely free from objection, unless possibly the first claim may be considered void as being a generic claim, if this Court should hold that generic claims are not allowable in design patents.

THE OPINION OF THE COURT BELOW.

The learned Judge (p. 9) very properly says, that in

determining the question whether the patent sued upon is invalid upon its face for want of novelty, the Court can only consider such familiar facts, as fall within the category of those things, of which judicial notice will be taken. He then quotes from the specification and claims. He then proceeds to construe the claims in a manner, the error of which we have already pointed out, and then he comes to the supposed old and familiar facts of which he takes judicial notice. He says: "It was not new to produce contrasts and variations in light and shade, or stereoscopic effects by depressions or elevations in the surface of materials. It was old to do this by arranging them in parallel lines as in wood, plaster and corduroy cloth."

It may be remarked in passing that neither wood, plaster nor corduroy are capable of use as materials for door mats or other analogous articles, and that soft rubber in its qualities, characteristics, appearance and uses is a substance totally unlike either.

The effect produced by the design is largely due to the peculiar dullness of the rubber, but apart from this, a design in wood, plaster or corduroy would never suggest the production of a similar design in soft rubber. In fact, the effect would be so different, that although there might be a similar configuration of lines, the appearance to the eye would be totally different—hence, the design would be different.

The learned Judge misunderstands the whole theory of the invention *and is mistaken as to matter of fact.* The effects contemplated in the patent are not produced by parallel lines of corrugations, but are produced *by the manner* in which different sets or series of parallel lines of corrugations are *related* to other parallel lines of corrugations. For instance, in the third claim, the parallel corrugations are arranged in sections, the general line of direction of the corrugations in one section, making angles with or being deflected to meet those of the corrugations in contiguous or other sections, substantially as shown in the drawing, which clearly illus-

trates this construction. So too in the second claim, the several series of parallel corrugations must have their lines related to each other, by being deflected at one or more points, substantially as set forth, in order to produce the effects contemplated by the patent. We are all familiar with corduroy cloth. The learned Judge speaks of arranging depressions or elevations in parallel lines, *as in wood, plaster and corduroy cloth.* There is nothing in the patent that suggests to any one to make a rubber mat consisting simply of parallel lines, such as are seen in corduroy cloth, and it is not pretended that there has been seen in wood and plaster any thing different from that which is shown in the corduroy cloth. So far as the second and third claims are concerned, this proposition does not admit of discussion. We do not hesitate to say that a pair of trousers made of corduroy, pieced up in sections, as shown in the drawing of this patent, would produce an effect at once startling and novel. Even if the Court below had been right in its assumptions, who can say that evidence cannot possibly show that the application of the devices to a new material produced new and useful results that made the patent valid (Smith vs. Goodyear Dental Vulcanite Co., 93 U. S., 496, 497)?

The learned Judge again says: "The design of this patent is not new, unless it embodies a new impression or effect, produced by an arrangement or configuration of lines, which introduces new elements of color or form." He then erroneously adds, "this is not claimed." That is a mistake; we do claim and expect to prove, and an inspection of any of the articles made under the patent will show, that a new impression or effect *is* produced by an *arrangement* or configuration of lines, which introduces new elements, both of color and form, partly, perhaps, owing to the peculiarity of rubber, partly due perhaps to its dullness and capacity for absorbing light, and also that the new form or configuration of lines is one of peculiar beauty and utility and of great value.

The utility of the design embodied in this material and for this particular article is shown by its very extensive use in hotels and public places, as well as in private houses.

While the language of the Court is not very clear, if it refers to any old thing that can affect all three claims of the patent, under any view of the law, it is something which has never come to our notice to the present day.

The learned Judge closes his opinion with these words: "None of the claims can be limited to a design which produces any definite or concrete impression to the eye." We have already shown that the third claim is certainly not obnoxious to any such objection and that the objection cannot properly be urged to the second claim. As to the first claim, it probably involves the very question, that we desire to present to this Court,—a question of vast importance to the owners of a class of property, that has come to be enormously valuable,—as to whether a design patent can contain a generic claim.

Cases of this kind should not be disposed of on Demurrer.

The practice resorted to, of deciding a case upon the doctrine of judicial notice alone, is a very dangerous one. It was a practice very much in vogue at about the time this bill was filed, although it has since been emphatically condemned by this Court in two instances (*Royer vs. Schulz Belting Co.*, 135 U. S., 319, reversing 28 Fed. Rep., 850, and 29 Fed. Rep., 281. *Keyes vs. Grant*, 118 U. S., 25, 36–37, reversing U. S. Circ. Ct. for Dist. of Colorado).

This summary way of disposing of a patent case on demurrer seems to have been first adopted by Judge Blodgett in *Western Electric Manf'g Co. vs. Odell, 18 Fed. Rep., 321*, and perhaps was justified in that case.

The case at bar is reported in 30 Fed. Rep., 785.

In *West vs. Rae, 33 Fed. Rep., 45,* Judge BLODGETT again dismissed a bill for the infringement of a patent on a demurrer.

In the *Eclipse Manf'g Co. vs. Adkins,* decided October 15, 1888, 36 Fed. Rep., 554, Fenton, pp. 118, 120, Judge BLODGETT points out in very clear terms the dangers of the practice. We quote his words:

"In West vs. Rae, 33 Fed. Rep., 45, this Court sustained a demurrer to a bill charging infringement of a patent on a device for protecting woolen blankets from insects by encasing them in paper bags, on the ground that within the common knowledge it was old to wrap or incase woolens in paper to protect them from dust or insects. At the time I announced the decision in that case I stated that its effect might be to encourage counsel to demur to biils for infringement of patents in cases where they, from their special knowledge of the art, might be of opinion that the device covered by the patent was old. And my anticipations in that respect have been fully realized, as that decision has already produced in this Court quite a bountiful crop of demurrers in this class of cases. But the Court must meet each case as it arises, and in sustaining demurrers like this, keep strictly within the field of common knowledge. The practical difficulty and danger is in defining where special knowledge leaves off and common knowledge begins. The Judge must always be careful to distinguish between his own special knowledge and what he considers to be the knowledge of others in the field or sphere where the device in question is used. But when the Judge, before whom rights are claimed by virtue of a patent, can say from his own observation and experience that the patented device is in principle and mode of operation only an old and well-known device in common use, he may act upon such knowledge. The case must, however, be so plain as to leave no room for doubt, otherwise injustice may be done, and the right granted by the patent defeated without a hearing upon the proofs. The Judge must, upon all such questions, vigilantly guard against acting upon expert or special knowledge of his own instead of keeping strictly within the field of general or popular knowledge. While I do not intend to lay down a rule, I am free to say that I

should not feel justified in holding a patent void for want of novelty on common knowledge, unless I could cite instances of common use which would at once, on the suggestion being made, strike persons of usual intelligence as a complete answer to the claim of such patent.

"The patent now under consideration is for a design by which the surface of a radiator is to be divided by a horizontal line into two rectangular spaces, and one of them, that is, either the upper or lower of these spaces, ornamented with figures, which may be produced by embossing or depressing upon the surface, or perhaps by painting. This certainly strikes me at first impression as a very close, if not doubtful, patent. I cannot, however, say from my own knowledge, or from any familiarity with radiators in common use, that it is not new. I may say that, so far as my own observation goes, I have never seen radiators ornamented in the manner shown in this patent, or by figures of any kind either embossed, depressed or painted thereon. Hence I am unable to say that this design is not wholly new and original with this patentee. As to the point that this patent is void because it does not describe the kind of figures, I can only say that I at present am of opinion that if this patentee was the first to invent or produce an ornamented radiator, that is, the first to design a radiator with an upper or lower rectangular space ornamented by figures of any kind upon it, then he may be entitled to a patent for such design. It may not have required a very high order of genius or inventive talent to have conceived and produced such a design, but if it was new, if it originated with him, then I cannot, on demurrer, say his patent is invalid. I have nothing at present before me from which I can say that it did not require study, thought and inventive talent to produce this design. The case can be far more satisfactorily and safely for the rights of all parties disposed of upon proof as to the state of the art. The demurrer is therefore overruled."

THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED; AND THE DEFENDANT BE ASSIGNED TO ANSWER THE BILL.

B. F. LEE,
WM. H. L. LEE,
Of Counsel.

FILED
OCT 7 1890
JAMES H. McKENNEY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 39.

THE NEW YORK BELTING AND PACKING COMPANY,
Appellant,

vs.

THE NEW JERSEY CAR-SPRING AND RUBBER COMPANY.

BRIEF ON BEHALF OF THE APPELLEE.

ARTHUR v. BRIESEN,
Counsel for the Appellee.

EVENING POST JOB PRINT, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 39.

THE NEW YORK BELTING AND PACKING COMPANY,
Appellant,

vs.

THE NEW JERSEY CAR-SPRING AND RUBBER COMPANY.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Brief on behalf of the Appellee.

This is an appeal from a decree in equity, sustaining the demurrer to the bill, brought by the complainant, now the appellant, against the defendant for the alleged infringement of certain Design Letters Patent granted to the appellant, as assignee of one George Woffenden, on the 27th day of May, 1879, and numbered 11,208, for an alleged new and useful design for a rubber mat.

The demurrer, which was sustained by the Court below, is in the following form (see Rec., pp. 7 and 8):

FIRST.—That it does not appear in and by said bill of complaint that the alleged new and useful design patented

in and by said Reissued Letters Patent No. 11,208 was "produced" by said George Woffenden.

SECOND.—That it does not appear in and by said bill of complaint that the alleged new and useful design patented in and by said Design Letters Patent No. 11,208 was "invented and produced by said George Woffenden, by his own industry, genius, efforts and expense."

THIRD.—That it appears on the face of the said Design Letters Patent No. 11,208, profert of which is made in said bill of complaint, that the Commissioner of Patents exceeded his jurisdiction in granting and issuing said Design Letters Patent No. 11,208.

FOURTH.—That it appears on the face of the said Design Letters Patent No. 11,208, profert of which is made in said bill of complaint, that said invention, if any such there may be, is not a design within the meaning of the act of Congress in such case made and provided, and cannot be protected by Design Letters Patent therefor; that is to say, the alleged design is not a "new and original design for a manufacture, bust, statute, alto-relievo or bas-relief;" nor a "new and original design for the printing of woolen, silk, cotton or other fabrics;" nor a "new and original impression, ornament, patent, print or picture, to be printed, painted, cast or otherwise placed on or worked into any article of manufacture;" nor a "new, useful and original shape or configuration of any article of manufacture."

FIFTH.—That it appears upon the face of said Design Letters Patent No. 11,208, profert of which is made in said bill of complaint, that said invention, if any such there be, is not a design within the meaning of the act of Congress in such cases made and provided, for which Letters Patent could lawfully issue, but is a method or means to be employed in producing various designs on rubber mats.

The first and second clauses of the demurrer relate to the bill of complaint, and were taken, because in and by the said bill of complaint it is not shown, that the provisions of Section 4929 of the Revised Statutes relating to design patents were complied with.

The third, fourth and fifth clauses of the demurrer relate to the patent itself, which upon its face, shows, that said patent was issued for that, which could not properly be claimed in a Design Letters Patent.

I.

PROFERT.

Profert of the patent has been made in the bill, and the patent therefore is to be considered a part of the bill. In the bill profert of said patent is made in the following words:

> "*As by said Letters Patent, or a certified copy "thereof, ready to be produced as this Court may "direct, and to which your orators beg leave for "greater certainty to refer, will more fully and at "large appear.*" (See Rec., p. 1.)

That these words amount to a profert of the Letters Patent can hardly be disputed in view of the authorities, a few of which are the following:

In *Wilder* vs. *McCormick*, 2 *Blatch.*, 31-35, the Court, speaking through Judge Betts, said:

> "*The sixth clause is, that the declaration does not "make sufficient profert of the Letters Patent. The "declaration says: 'as by the said Letters Patent and "'specification, all in due form of law, ready in Court "' to be produced, will fully appear!' This is equiva-*

> " *lent to profert in the most formal and ample terms.*
> " *It tenders the entire grant to the inspection of the*
> " *Court and party.*"

Such profert makes the patent, when produced, *a part of the bill.* See the case of *Pitts* vs. *Whitman*, 2 *Story*, 609 (*S. C.*, 2 *Robb*, 189, 195), where Mr. Justice Story said:

> " *The profert of the Letters Patent* (*of which the*
> " *specification constitutes a part*) MAKES THE LETTERS
> " PATENT, WHEN PRODUCED, A PART OF THE DECLARA-
> " TION, *and so gives all the certainty as to the inven-*
> " *tion and improvement patented, which is required*
> " *by law.*"

See also the opinion of Judge Coxe in the case of *Bogart* vs. *Hinds*, 25 *Federal Reporter*, 484, where the Court makes use of the following language:

> " *The weight of opinion is in favor of the proposi-*
> " *tion that where profert is made of a recorded paper*
> " *it is for all purposes presented to the Court as part*
> " *of the pleading, and an objection thereto may be*
> " *taken by demurrer.*"

See also the cases there cited.

In *American Bell Telephone Co.* vs. *Southern Telephone Co.*, 34 *Federal Rep.*, 803, 804, Mr. Justice Brewer used the following language:

> " *The weight of authority is, that the profert of any*
> " *recorded instrument is equivalent to annexing a*
> " *copy.*"

See also

Powder Co. *vs.* Powder Works. 98 U. S., 126.
Marshall *vs.* Turnbull, 34 Federal Rep., 827.
Collins Co. *vs.* Capitol Co., 42 Federal Rep., 64.

United States *vs.* Spalding, 2 Mason, 478.
Post *vs.* Richards, 25 Federal Rep., 905.
Post *vs.* Richards, 26 Fed. Rep., 618.
Curtis on Patents, § 406.
McMillin *vs.* St. Louis Company, 18 Federal Rep., 260.

II.

HE BILL OF COMPLAINT IS DEFECTIVE AND INSUFFICIENT FOR THE REASONS SUBSTANTIALLY AS SET FORTH IN THE FIRST AND SECOND PARAGRAPHS OF THE DEMURRER, IN THAT IT FAILS TO ALLEGE THAT THE PATENTED DESIGN WAS "INVENTED AND PRODUCED BY SAID GEORGE "WOFFENDEN, BY HIS OWN INDUSTRY, GENIUS, EFFORTS "AND EXPENSE."

The allegation to the effect that application was made for *Design* Letters Patent, is couched in the language applied to Letters Patent for *mechanical* inventions, and omits to state, that the patentee complied with those conditions, which the statutes of the United States declare, in express terms, are necessary before a *design* patent may be granted.

The allegation in the bill is as follows:

"1. *That heretofore, to wit, prior to the twenty-*
"*seventh day of May*, 1879, *one George Woffenden,*
"*having theretofore* INVENTED *a new and useful de-*
"*sign for rubber mats, made application in due form*
"*of law, to the Commissioner of Patents, for Letters*
"*Patent of the United States for said design, and*
"*having complied with the various requirements of*
"*law in such cases made and provided, the said*
"*George Woffenden was adjudged to be justly en-*
"*titled to a patent under the law.*" (See Rec., p. 1)

The law defining in what particular instances patents for designs may be obtained is to be found in Section 4929, Revised Statutes. This section provides as follows:

> "*Any person who*, BY HIS OWN INDUSTRY, GENIUS, "EFFORTS AND EXPENSE, HAS INVENTED AND PRO- "DUCED *any new and original design for a manu- "facture (&c.), * * * the same not having been "known or used by others before his* INVENTION OR "PRODUCTION *thereof, or patented or described in any "printed publication, may, upon payment of the fee "prescribed, and other due proceedings had, the same "as in cases of inventions or discoveries, obtain a "patent therefor.*"

The contention of the appellee is, that prior to the grant of the Design Letters Patent, certain conditions must be performed by the patentee. If one or more of these conditions be not performed, the patent is invalid and void. What these conditions are, Section 4929, R. S., sets forth in detail. According to that section the new and original design must be PRODUCED as well as invented by the patentee; and further, MUST BE INVENTED AND PRODUCED "BY HIS OWN INDUSTRY, GENIUS, EFFORTS AND EXPENSE." These conditions go to *facts*, which are not settled by the grant. The appellant cannot, therefore, invoke the mere conclusion of law set forth in his bill, to the effect that the patentee "complied with the various requirements of law in such cases made and provided." It is well known that facts, not conclusions of law, should be pleaded, and that a defect in this particular is fatal. It is for the Court itself to determine, what conclusion the law will arrive at, when the facts or circumstances upon which the conclusion is to be based, are placed before it.

The text books lay this down as the universal rule.

Thus Story, in his Equity Pleadings, Section 257, says:

> "*Every fact essential to the plaintiff's title to main- "tain the bill, and obtain the relief, must be stated in "the bill, otherwise the defect will be fatal.*"

To like effect is Sec. 241, same volume.

And in 1 Dan. Chan. Prac., *319:

> "*Where it appears that, in order to complete the "plaintiff's title to the subject of the suit, or to the "relief he seeks, some preliminary act is necessary to "be done, the performance of such preliminary act "ought to be averred upon the bill, and the mere alle-"gation that the title is complete, without such aver-"ment will not be sufficient.*"

To like effect is *page 360 of same volume.

The bill *must* set forth these facts for the further reason, that it is necessary that they should appear, to enable the defendant to deny, that the statute as to one or all of these requirements, had been fully complied with. Or in other words, these facts must be set forth in such terms as to be issuable.

Thus in Hewison *v.* New Haven, 34 Conn., 136, it was held that—

> "*The law is well settled that an allegation of duty "without stating the facts which raise the duty is "insufficient.*"

And again in

Houghton *v.* Reynolds, 2 Hare, 266:

> "*There must, no doubt, be such certainty in the "averment of the title upon which the bill is founded, "that the defendant may be distinctly informed of "the nature of the case which he is called upon to "meet.*"

And also in

Cothran *v.* Scanlan, 34 Ga., 557:

> "*The general statement that a tender was made is "not enough. It is as defective as a general aver-*

> " *ment of fraud. That a tender was made is a con-*
> " *clusion of the pleader simply. He must state the*
> " *facts which constitute a legal tender * * * the*
> " *facts must be so stated as to be issuable. The de-*
> " *fendant must be notified of the facts, out of which*
> " *the plaintiff's equity springs, and which he is to*
> " *controvert.*"

See also

Davenport *v.* Alston, 14 Ga., 271.

Any rights which the appellant may have are wholly statutory. Its title to its patent is derived from an express statute, and such statute expressly requires certain facts to exist.

As was held by Judge Benedict in Wooster *vs.* Crane, 5 Blatch., 282, 283:

> " *The Act, although it does not require utility in*
> " *order to secure the benefit of its provisions,* DOES
> " REQUIRE THAT THE SHAPE PRODUCED SHALL BE THE
> " RESULT OF INDUSTRY, GENIUS, EFFORTS AND EXPENSE."

The bill should therefore show on its face the existence of those facts which the statute requires.

In the suit of the Chicago Music Co. *v.* Butler Paper Co., 19 Fed. Rep., 758, 759, which was an action at law for the alleged infringement of a copyright, Judge Blodgett said :

> " *The plaintiff must show that he has taken the steps*
> " *required by law. Here there is no statement in the*
> " *first place, as I have already said, that he ever was*
> " *either the author or proprietor, by virtue of having*
> " *acquired the rights of the author; there is no aver-*
> " *ment that he ever filed with the Librarian of Con-*
> " *gress, before publication, the title of the work, and*
> " *that within ten days after publication he delivered*
> " *or forwarded to the Librarian of Congress the two*
> " *copies required by the law which make his copy-*
> " *right complete.*

"*The demurrer to this amended declaration must*
"*therefore be sustained.*"

And again it was held by this Court in

Wheaton *vs.* Peters, 8 Peters, 591, 663, 664, 665:

"*No one can deny that when the Legislature are*
"*about to vest an exclusive right in an author or an*
"*inventor, they have the power to prescribe the con-*
"*ditions on which such rights shall be enjoyed; and*
"*that no one can avail himself of such right who*
"*does not substantially comply with the requisi-*
"*tions of the law.*
"*This principle is familiar as regards patent*
"*rights; and it is the same in relation to the copy-*
"*right of a book.* * * * * * *
"*All the conditions are important; the law requires*
"*them to be performed; and, consequently, their per-*
"*formance is essential to a perfect title.*"

So in the present case, the law prescribes certain conditions to be performed, before a patentee can obtain a Design Letters Patent. These conditions differ in Design Letters Patent from those in Letters Patent for mechanical inventions.

Contrast Section 4886 with Section 4929. One who invents a machine and obtains a patent must plead in a bill:

FIRST.—That he invented it.

SECOND.—That he obtained his patent.

Such a plea shows that before he entered the Patent Office he had done that which the law requires, viz., invent the machine. The issue of the patent is *prima facie* evidence, that afterwards, all the law required was done in the Patent Office, such as the filing of the proper oath, proper specification, &c. The design law, however, says:

A patent shall not merely be given to the *inventor* of a design, but he must also be the *producer*, and then even it limits him still further, *he must be the producer at his own expense.*

Supposing Woffenden invented this design, but did not produce it, his patent for a design would be void on that account. Supposing he even invented it and also produced it with his own hand, but did so *at the expense of the complainant* in whose employ he was, and not at his own expense, the patent then would be void.

These requirements of the statute have nothing to do with the duty of the Commissioner of Patents. His duty is to merely take the oath of invention as provided by Section 4892, and to inquire whether the invention is new and not in public use two years. The Commissioner does not look whether the applicant is the producer, or at whose expense the thing was gotten up, and we therefore claim that the complainant, in order to maintain its suit, should show—

FIRST.—That the requirements of the law that applies to such cases, before the applicant gets into the Patent Office, have been satisfied.

SECOND.—That after he got into the Patent Office the necessary steps required by that Bureau were also taken.

The issue of the patent is *prima facie* evidence of only the second of these requirements.

One distinguishing feature between a design and a mechanical patent is pointed out in the case of Streat *vs.* White, 35 F. R., pp. 427–428.

That suit was brought upon a Design Letters Patent, and in dismissing the bill Judge Shipman said:

> " *The point in the case which I deem of the most*
> " *importance and of most danger to the patent is in*
> " *regard to the fact of invention by Streat. He con-*
> " *ceived the idea of imitating a seersucker fabric, and*

" of having one stripe crossed at right angles by cross-
" bars, in which there was no novelty, and then sub-
" mitted the project of an imitation to Mr. Gilmore,
" the manager of a factory for printing cotton goods,
" with the request that he cause it to be produced;
" which was done by the designer and engraver in
" Gilmore's factory." * * *

" The case does not contain the facts which generally
" come before courts upon the subject of joint or sole
" invention. It is not that of an inventor and a
" workman who puts into form the inventor's new idea.
" The idea of Streat was old. Had it been new, the
" facts would be different. The invention consisted
" in the new and successful way by which the old idea
" was made effective. Streat was the originator of
" nothing novel, except indirectly. He asked the
" designer to furnish an accurate imitation of the
" seersucker, and, if invention was necessary, to in-
" vent an imitation, and his request was complied
" with. The bill is dismissed."

The law prescribes certain provisions, necessary to obtain Reissued Letters Patent; these provisions are found in Section 4916 of the Revised Statutes; and under that section, in order to surrender the original patent and to give to the Commissioner of Patents jurisdiction, to entertain an application for a reissue, the following conditions must exist:

1. The original patent must have been inoperative or invalid.

2. The original patent must have been so inoperative or invalid, either by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more, than he had a right to claim as new.

3. The error must have arisen by inadvertence, accident or mistake, and without any fraudulent or deceptive intention.

In the case of *Gould* v. *Spicer*, heard before Mr. Justice Gray and His Honor Judge Colt in the Circuit Court in and for the District of Rhode Island, in June, 1882, the Court held orally that a demurrer to a bill in equity brought upon a Reissued Letters Patent should be sustained on the ground that the bill stated that the original patent "was duly proffered for surrender for reissue," and that "said proffered surrender was duly accepted for due cause." The bill was demurred to on several grounds, of which one was to the effect that the bill did not show upon its face that the causes existed which would warrant the surrender of the original patent. Upon the presentation of this ground for demurrer the Court held that it was well taken and ordered the bill to be amended, which was done, the amendment being in the following form:

> "*Complainant amends the bill of complaint in the "above cause by inserting in paragraph third, after the "words 'surrender for reissue' in third line, the words "'for the reason that said Letters Patent were in- "operative and invalid by reason of a defective or in- "sufficient specification, said error having arisen by "inadvertence, accident, or mistake, and without any "fraudulent or deceptive intention.'*"

But, in the case of Wollensak *vs.* Reiher, 115 U. S., p. 96, this Court went still further, and held, that in the case of a Reissued Letters Patent, obtained after a delay of five years and with expanded claims, it was not sufficient, simply to state in the bill the conditions above set forth, but the bill must fully state the facts or circumstances accounting for the delay. We quote from the opinion (pp. 100–102):

> "*In the present case the delay in applying for the "reissue was more than five years.* NO SPECIAL CIR-

" CUMSTANCES TO ACCOUNT FOR OR EXCUSE THE DELAY " ARE SET OUT IN THE BILL. *In lieu of such a state-* " *ment, the complainant avers that he presented to* " *the Patent Office a full, sworn statement of facts* " *and circumstances connected with his applying for* " *and obtaining his original patent, and with his* " *delay in applying for the reissue, and that the* " *examiners-in-chief decided that he had sufficiently* " *and satisfactorily explained the delay, and was* " *entitled to the reissue.* BUT THIS DOES NOT SATISFY " THE LAW."

" * * * *This rule of equity pleading applies in* " *analogous cases; as where, it otherwise appearing on* " *the face of the bill that the claim is stale, or is barred* " *by lapse of time, and it is sought to avoid the effect of* " *such a bar, on the ground that the fraud complained* " *of was concealed, and has been only recently dis-* " *covered, it is necessary that ' the particular acts of* " *fraud or concealment should have been set forth* " *by distinct averments, as well as the time when dis-* " *covered, so that the Court may see whether, by the* " *exercise of ordinary diligence, the discovery might* " *not have been before made.'* (*Beaubien* v. *Beaubien*, " 23 *How.*, 190; *Stearns* v. *Page*, 7 *How.*, 819; *Moore* " v. *Greene*, 19 *How.*, 69; *Marsh* v. *Whitmore*, 21 " *Wall.*, 178, 185; *Godden* v. *Kimmell*, 99 *U. S.*, 201; " *Badger* v. *Badger*, 2 *Wall.*, 87, 95; *Wood* v. " *Carpenter*, 101 *U. S.*, 135; *Landsdale* v. *Smith*, 106 " *U. S.*, 391)."

The rule that a bill must affirmatively state, that an invention was not in public use or on sale in this country, for more than two years before application for a patent, announced by Judge Shipman in Blessing *et al. vs.* Trageser Steam Works, 34 Fed. Rep., 753. in view of Andrews *vs.* Hovey, 123 U. S., 267, and 124 U. S., 694, also shows that statutory requirement must be pleaded; and that, there-

fore, the first and second grounds of appellee's demurrer are well founded.

The present bill of complaint, it will be seen, is also silent on the point touched upon in Blessing *et al. vs.* Trageser.

III.

THE PATENT IN SUIT IS VOID FOR UNCERTAINTY AS TO THE MATTER CLAIMED THEREIN.

Section 4929 provides that in certain instances Design Letters Patent may be obtained for—

> "*any new and original design for a manufacture,*
> "*bust, statue, alto-relievo, or bas-relief; any new and*
> "*original design for the printing of woolen, silk,*
> "*cotton, or other fabrics; any new and original im-*
> "*pression, ornament, patent, print or picture to be*
> "*printed, painted, cast, or otherwise placed on or*
> "*worked into any article of manufacture; or any*
> "*new, useful and original shape or configuration of*
> "*any article of manufacture.*"

The particular geometrical figure shown in the drawing of Design Letters Patent No. 11,208, if it be new and original, might possibly be a proper subject for a design patent, but when the specification and claims are examined, it will be found that this drawing serves only as an illustration of one of a great variety of designs, and that the patentee does not limit himself to nor claim any one particular figure or design.

The patentee begins by stating that he has invented and produced "*a* new and original *design* for rubber mats." He then says: "*the design consists* in parallel lines of cor-

rugations, depressions or ridges," this arrangement producing effects that are "kaleidoscopic in character," or "moire effects," or "stereoscopic effects." Following this he says: "the drawing represents a mat embodying *this design*," and then he gives a description of the drawing.

Thus far the specification might imply that the invention is one certain and particular figure, but what follows shows that it is the real purpose of the patent to protect a great variety of different designs.

The specification says: "*The above forms simply* ONE OF THE MANY WAYS *in which my invention may be carried into effect. The corrugations in the center and outer border need not extend entirely around the mat.* * * * THEY MAY RUN IN ANY DIRECTION. *The ridges and depressions in the intermediate borders might be made to form different angles with each other or with those in the other sections, or the borders might be increased or diminished in number;*" and the corrugations in the centre instead of bending four times "*may be made to change their line of direction any desired number of times in a regular or irregular way;*" and the mat may be divided "*by a number of imaginary lines representing a projection* OF ANY GEOMETRICAL FIGURE, *and in each of the sections so formed make parallel corrugations or alternate ridges and elevations;*" and when a moire effect is desired, the inventor makes "*the ridges and depressions undulating.*"

The specification further states: "*It will of course be understood that the effect produced and the manner in which the appearance varies, are modified more or less by these changes.*"

Finally, in order that the public may understand, that an almost infinite variety of designs is covered by this patent, the specification states:

> "*I desire, therefore, to have it understood that* I DO "NOT INTEND TO LIMIT THE DESIGN TO PARALLEL COR- "RUGATIONS, *which are straight throughout any con-*

"*siderable portion of their length,* (AS REPRESENTED ON "THE DRAWING FOR EXAMPLE,) BUT THAT IT INCLUDES "THE UNDULATING RIDGES AND DEPRESSIONS, *or other* "*disposition or formation in which the corrugations* "*alter their direction irregularly, or in which they* "*may be straight for a certain distance and then* "*formed in undulations,* AND THAT IT INCLUDES THE "CORRUGATIONS ARRANGED IN CONCENTRIC CIRCLES, IN "SPIRALS, IN ZIGZAGS, OR ACCORDING TO ANY DESIRED "FIGURE."

The claims are as follows:

"1. A DESIGN *for a rubber mat, consisting of cor-* "*rugations, depressions, or ridges in parallel lines,* "*combined or arranged relatively, substantially as* "*described, to produce variegated, kaleidoscopic,* "*moire, stereoscopic, or similar effects, substantially* "*as set forth.*"

"2. A DESIGN *for a rubber mat, consisting of a* "*series of parallel corrugations, depressions, or* "*ridges, the lines of the said corrugations being de-* "*flected at one or more points, substantially as set* "*forth.*"

"3. A DESIGN *for a rubber mat, consisting of a* "*series of parallel corrugations, depressions, or* "*ridges arranged in sections, the general line of* "*direction of the corrugations in one section making* "*angles with or being deflected to meet those of the* "*corrugations in the contiguous or other sections,* "*substantially as described.*"

The first claim is, for the arrangements of corrugations, depressions or ridges in parallel lines to produce the great variety of figures mentioned in the specification; the second claim is for these arrangements, *the corrugations being deflected;* and the third claim is for these

arrangements, the corrugations in one section being deflected *to meet those (?) of the corrugations in the contiguous or other sections.*

The patent is very careful in all three claims to claim "*a design*," "*substantially as described*," or "substantially as *set forth*," and nowhere does it claim *the* figure *shown* in the drawing.

The claims are not limited to any one particular design or figure, but they apply equally to all the possible designs or figures in which corrugated, depressed or ridge-shaped pieces of rubber are used.

As Judge Wallace stated in his opinion (p. 10, Rec.):

> "*The patent is an attempt to secure to the patentee "a monopoly of all ornamentation upon rubber mats "by which variations of light and shade are pro- "duced by a series of ridges and depressions without "regard to any particular arrangement or charac- "teristics of the lines except that they are to be parallel. "Although there is an illustration in the drawing, and "although each claim is for a design 'substantially "as described,' the language of the specification is "carefully expressed so as not to restrict the claims to "the design shown in the drawing, but so that the "first claim shall include every variety which can be "produced by the arrangement of corrugations, de- "pressions, or ridges in parallel lines; the second, all "obtainable when by the arrangement the corruga- "tions are deflected, and the third, all obtainable "when by the arrangements of corrugations in sec- "tions those of one section make an angle with those "in the contiguous or other sections.*"

The patent being therefore, for the means or method to be employed in producing various effects, is void.

> "*Manifestly the mode in which those appearances "are produced, has very little, if anything, to do with "giving increased salableness to the article. It is the*

> " *appearance itself which attracts attention and calls*
> " *out favor or dislike. It is the appearance itself,*
> " *therefore, no matter by what agency caused, that*
> " *constitutes mainly, if not entirely, the contribution*
> " *to the public which the law deems worthy of recom-*
> " *pense. The appearance may be the result of peculi-*
> " *arity of configuration, or of ornament alone, or of*
> " *both conjointly, but, in whatever way produced, it is*
> " *the* NEW THING, *or product, which the patent law*
> " *regards.*"
>
> Gorham Co. *vs.* White, 14 Wallace, 511, 525.

In the case of Clark *v.* Bousfield, 10 Wallace, 133, the Supreme Court had under consideration a patent in which was the following claim: " We claim arranging the elastic material aforesaid, whether curved or rectangular in form, in a series of distinct staves or designs, substantially as and for the purposes herein shown and set forth," and the Court said (page 139):

> " *It will be seen by reference to the eleventh section*
> " *of the Act of* 1861, *that if the second claim is patent-*
> " *able under this section, it must be a claim for an*
> " *original design or impression, or ornament, or pat-*
> " *tern or picture, and the like,* WHOLLY IRRESPECTIVE
> " OF THE MEANS OF PRODUCING IT. *The patent is sim-*
> " *ply for the design, &c., itself.*"

This case is also an authority, showing that where the claim purports to be for a design, reference will be had to the other parts of the patent to detemine whether it is so in fact.

The appellant's patentee describes in his specification the manner in which *various designs* may be produced.

He lets the public exercise its own ingenuity as to the particular designs it will create.

The test of infringement, as applied to patents for designs, is, whether to the eye of an ordinary purchaser the

design as shown in the patent is the same as that claimed to be an infringement.

Gorham Co. *vs.* White, *supra.*
Jennings *vs.* Kibbe, 20 Blatchfd., 353.
Tomkinson *vs.* Willets Mfg. Co., 23 Fed. Rep., 895.

> " *Designs, of course, relate solely to the appearance*
> " *of the article to the ordinary purchaser.*"
> Foster *vs.* Crossin, 23 Fed. Rep., 400.

But how could this test be applied when the patent covers designs which are not shown?

The patent is bad and of no effect in law, mainly because the claims are uncertain and indefinite.

In Post *vs.* T. C. Richards Hardware Co., 26 Fed. Rep., 618, the claim under consideration was

> " A NEW AND ORIGINAL DESIGN *for a curtain and loop,*
> " *consisting of an ornamental melallic chain, in con-*
> " *nection with a curtain adapted to be gathered to*
> " *the side of the window, and be held by said chain,*
> " SUBSTANTIALLY AS DESCRIBED."

The case came up before Judge Shipman on a demurrer, the first and second grounds of which are identical with the third and fourth grounds of this defendant's demurrer. On argument the demurrer was sustained.

The most instructive case, however, is Condé *v.* Valkenburgh, 39 Federal Rep., 788, in which the Court (Mr. Justice Blatchford) used the following words:

> " *The drawing annexed shows a particular pattern*
> " *to the eye, but the claim is not for that pattern. It*
> " *is for every pattern or design where the body of the*
> " *shirt is of one pattern, and the front and collar*
> " *are of another pattern, and the front is orna-*
> " *mented by a lacing down the centre. It is doubt-*

"*ful whether so broad a claim is valid, because not*
"*a claim for a particular design, in the sense of the*
"*statute.*"

The case of Dukes *v.* Bauerle, 41 Federal Reporter, p. 778, is also instructive, particularly that portion of the decision wherein Judge Blodgett says (p. 780):

"*The statute gives a patent for an 'ornament' to*
"*be placed on or worked into any article of manu-*
"*facture, and an 'ornament' may be composed of*
"*more than one figure,* BUT THE FIGURES OR LINES
"MUST ALL BE NECESSARY TO MAKE THE ONE ORNA-
"MENT; *that is, more than one figure, or combination*
"*of lines may be grouped together to make* ONE *orna-*
"*ment, but one claim cannot cover several figures or*
"*ornaments, which stand in no way related to each*
"*other.*"

IV.

THE PATENT IS VOID FOR WANT OF INHERENT NOVELTY.

The only thing to which the complainant's patent here in suit seems to lay claim is, any corrugated strip of rubber arranged in any suitable manner. Corrugated wood in picture frames and the like was old; corrugated creases in mortar-covered walls are well known; corrugated or diagonally striped dress goods were old. In joining these pieces a peculiar effect of shade and light was produced. Is it a new invention to do this in rubber? The patent admits the principle to be old in moire or watered silk. Where then is the novelty? Tiles, corrugated in parallel ridges and depressions, which meet in varying angles, are old. They are used in ordinary households as supports for

coffee pots and the like; also as floor coverings. Is it patentable to make such tiles of india-rubber? In architecture the same principle is frequently applied in chevrons, crenelated moldings, guilloches and the like.

Judge Wallace, in his opinion, states (p. 11, Rec.):

> *"It was not new to produce contrasts and varia-*
> *"tions in light and shade or stereoscopic effects by*
> *"depressions or elevation in the surface of materials.*
> *"It was old to do this by arranging them in paralell*
> *"lines, as in wood, plaster and corduroy cloth. It is not*
> *"novelty which will sustain a design patent to trans-*
> *"fer to rubber or to a rubber mat an effect or impres-*
> *"sion to the eye, which has been produced upon other*
> *"materials or articles by contrast or variation of*
> *"light and shade. The design of this patent is not*
> *"new unless it embodies a new impression or effect*
> *"produced by an arrangement or configuration of*
> *"lines which introduces new elements of color or*
> *"form. This is not claimed.*
>
> *"None of the claims can be limited to a design*
> *"which produces any definite or concrete impression*
> *"to the eye."*

In the case of Wooster *vs.* Crane, 5 Blatchf., 282, 283, Judge Benedict held that

> *"The act * * * must, also, I think, be held to*
> *"require that the shape or configuration sought to be*
> *"secured, shall, at least, be new and original, as ap-*
> *"plied to articles of manufacture. But here the shape*
> *"is a common one in many articles of manufacture,*
> *"and its application to a reel cannot be said to be*
> *"the result of industry, genius, efforts and expense.*
> *"* * * Its selection can hardly be said to be the*
> *"result even of effort."*

Supr. Ct. Dist. of Columbia, *in re* Niedringhaus, Off. Gaz., Aug. 17, 1875, p. 280.

"*The claim* (in a design patent) *must not be for a copy or imitation of that which is in existence.*"

See also Osborn *vs.* Judd, 29 Federal Rep., 96.

Courts have taken judicial notice of the prior state of the art and have adjudged patents to be invalid for non-patentability, irrespective of any testimony.

Thus this Court, speaking through Mr. Justice Swayne, in the case of Terhune *vs.* Phillips, 99 U. S., 592, say:

"*We cannot fail to take judicial notice that the thing patented was known and in general use long before the issuing of the patent. The substitution of metal for wood was destitute both of patentable invention and utility. The admission of improper testimony, if it occurred, was, therefore, immaterial.* THE CASE OF THE APPELLANT AS IT APPEARS IN THE RECORD WITHOUT ANY TESTIMONY IS CLEAR AND CONCLUSIVE AGAINST HIM."

Again, this Court in the case of Brown *v.* Piper, 91 U. S., 37, 43, says:

"*The pleadings and proofs in the case under consideration are silent as to the ice cream freezer: But it is a thing in the common knowledge and use of the people throughout the country. Notice and proof were, therefore, unnecessary. The statute requiring notice was not intended to apply in such cases. The Court can take judicial notice of it, and give the same effect as if it had been set up as a defense in the answer and the proof were plenary.* (*See* M. & A. GLUE CO. *v.* UPTON, 6 PATENT OFFICE GAZETTE, 843, and NEEDHAM *v.* WASHBURN, 7 *Id.*, 651, *both decided by Mr. Justice Clifford upon the Circuit.*)"

V.

THE POINTS HERE RAISED ARE PROPER TO BE RAISED BY DEMURRER.

When a patent has been reissued, and the reissue is before the Court for its consideration, it is well settled, that if it appears upon the face of the reissue, that it is not for the same invention, as the original patent, the Court will, as a matter of law, declare the reissued patent to be invalid, and that the question may be examined on a demurrer.

> "*If it appears upon the face of the reissued patent "that it is not for the same invention as that embraced "or secured in the original patent, then it would be the "duty of the Court, as a matter of law, to declare the "reissued patent invalid.*"
>
> Metropolitan Washing Machine Co. *vs.* Providence Tool Co., 1 Holmes, 161, 163.

> "*We have no doubt that the question may be ex- "amined on demurrer; for the bill sets forth in full "both the original patent and the reissues, so that "they may be examined and compared together. "* * * * * We feel no hesitation, therefore, in "approaching the consideration of the questions pre- "sented by the pleadings.*"
>
> Powder Co. *vs.* Powder Works, 98 U. S., 126, 134.

See also

Wollensak *v.* Reiher, *supra.*

So, also, in the case of a design patent the Court will consider, on demurrer, the question whether the patented

design is, in the eye of the law, a design for which a patent could lawfully issue.

This was done in Post *vs.* T. C. Richards Hardware Co. (26 Fed. Rep., 618), and Judge Shipman there allowed the demurrer.

See also Bogart *vs.* Hinds, 25 Federal Rep., 484; and the authorities hereinabove referred to under the heading: "*Profert*," on pages 4 and 5 of this brief.

For all these reasons we believe, the decree of the Circuit Court, sustaining the demurrer, should be affirmed.

Respectfully submitted,

ARTHUR V. BRIESEN,
Counsel for the Appellee.

NEW YORK, October 1, 1890.

137-45.1-48 Two cases

Supreme Court of the United States,

October Term, 1890.

EX PARTE

IN RE

THE PENNSYLVANIA COMPANY,

PETITIONER.

PETITION FOR MANDAMUS.

The petition of the Pennsylvania Company, a corporation duly organized under the laws of the State of Pennsylvania, and a citizen thereof, respectfully shows to this Honorable Court;

First. That Alberto T. Roraback, a citizen of the State of Connecticut, is the judge of the Court of Common Pleas for Litchfield County, in said State of Connecticut, and that under the law of the State of Connecticut, in a suit brought in said State Court, in which there is a controversy between a citizen of said State of Connecticut and a citizen of another State, the defendant, being such citizen of another State, has not the right, on account of prejudice or local influence, to remove said suit into any other State Court;

Second. That the said Alberto T. Roraback, then and ever since and now a citizen of said State of Connecticut, as sole plaintiff, by writ dated and issued on the 4th day of

June, 1889, and returnable on the 1st Monday of July, 1889, brought a suit at law against your petitioner, then and ever since and now a citizen of the State of Pennsylvania, as sole defendant in said Court of Common Pleas for Litchfield County, in the State of Connecticut, a State Court and within the District of Connecticut, at its term commencing on the 1st Monday of July, 1889;

Third. That your petitioner appeared to defend said suit and filed its answer therein in said Court, and that by due continuances said suit came to the March term, 1890, of said Court and was then pending therein and upon the docket of said Court;

Fourth. That in said suit there was and is a controversy between a citizen of the State in which the suit was brought, to wit: the said Roraback, plaintiff, and a citizen of another State, to wit: your petitioner, the defendant; and that the matter in dispute in said suit was $500, exclusive of interest and costs;

Fifth. That during said March term, 1890, of said Court, and while said suit was pending therein and before the trial thereof, your petitioner made and filed in said Court a petition in said suit, addressed to said Court, for the removal of said suit to the United States Circuit Court for the District of Connecticut, and alleged in said petition as the ground of such removal that from prejudice against your petitioner, the defendant in said suit, and from the local influence of the said Roraback, the plaintiff therein, your petitioner would not be able to obtain justice in said State Court, or in any other State Court to which the said defendant had the right under the laws of the State of Connecticut, on account of such prejudice and local influence, to remove said cause, and made and filed therewith an affidavit of the proper officer of your petitioner, showing that he had reason to believe and did believe, that from prejudice and local influence, the defendant, your petitioner, would not be able to obtain justice in said State Court, nor in any other State Court

to which it had the right under the laws of said State of Connecticut, on account of such prejudice and local influence, to remove said cause, and further showing the existence of such prejudice and local influence, and that on account of them it would not be able to obtain justice in said State Courts; and your petitioner also made and filed therewith a bond with good and surety for its entering in said Circuit Court of the United States for the District of Connecticut, on the first day of its next session, a copy of the record in said suit, and for paying all costs that might be awarded by said Circuit Court, if said Court should hold that said suit was improperly removed;

Sixth. That afterwards, to wit: on the 15th day of March, 1890, said Court of Common Pleas for Litchfield County, after hearing had, accepted said petition and bond, and granted the prayer of said petition, and ordered that said suit be removed to the said Circuit Court of the United States for the District of Connecticut, and that no further proceedings be had in said State Court;

Seventh. That afterwards, at the opening of said Circuit Court on the 1st day of its next session, being the 4th Tuesday of April, 1890, your petitioner entered in said Circuit Court a full copy of the record in said suit, and on the same day your petitioner filed in said Circuit Court a petition addressed to it, reciting the various steps above mentioned taken by your petitioner to secure the removal of said cause from said State Court to said Circuit Court, and farther alleging that from prejudice against the defendant, your petitioner, and the local influence of the plaintiff in said suit, your petitioner said defendant would not be able to obtain justice in said State Court, nor in any other State Court to which the defendant in said suit might, under the laws of the State of Connecticut have the right on account of such prejudice and local influence, to remove said cause; and further praying said Circuit Court to take jurisdiction of said suit and to remove the same from said State Court, if the same had not already been removed into said Circuit Court

from said State Court, by the before mentioned steps already taken by your petitioner, and by the action of said State Court in ordering said removal and staying all further proceedings in said State Court in said suit; and at the same time with the filing of said petition to the Circuit Court, your petitioner filed in said Circuit Court an affidavit of the proper officer of your petitioner, setting forth all the facts which proved the existence of such prejudice and local influence in said State Court, and that on account of such prejudice and local influence, the defendant, your petitioner, would not be able to obtain justice in said State Court, or in any other State Court to which it had the right, under the laws of the State of Connecticut, on account of such prejudice and local influence, to remove said cause;

Eighth. That by said petitions and affidavits, your petitioner made it to appear to said Circuit Court that from prejudice and local influence it would not be able to obtain justice in said suit in said Court of Common Pleas for Litchfield County, in the State of Connecticut, or in any other State Court to which your petitioner had the right under the laws of the State of Connecticut, to remove said cause, on account of such prejudice and local influence; and that said suit was duly entered upon the docket of said Circuit Court;

Ninth. That thereafter the plaintiff in said suit made a motion in said Circuit Court, before the Honorable William J. Wallace, holding said Court, to remand the same to said State Court, on the ground that the amount in dispute in said suit did not exceed the sum of $2000, exclusive of interest and costs. Whereupon after hearing had, Judge Wallace, on the 16th of May, 1890, filed the following opinion: "The question in this case is whether, under the local prejudice clause of the Act of March 3d, 1887, the matter in dispute must exceed in amount the sum of $2000 to entitle the defendant to remove

the suit from a State Court. This question has been considered in several of the Circuits with a diversity of opinion as to the true construction of the clause. My own views accord with those expressed by Mr. Justice Harlan in Malone vs. The Richmond & D. R. R. Co. (35 Fed. Rep. 625,) and it is unnecessary to reiterate his reasons for the conclusion reached. I think it was the intention of Congress to place the right of removal for local prejudice upon the jurisdictional basis of all other removable controversies, discriminating in favor of the defendant, only as to the time of making the application and permitting a single defendant to remove. The motion to remand is granted."

Tenth. That afterwards, on the 20th day of May, 1890, the following order was entered in said cause in said Circuit Court:

"ALBERTO T. RORABACK	Circuit Court of the United States, District of Connecticut, April Term, 1890.
vs.	
THE PENNSYLVANIA COMPANY.	

Order to remand to State Court.

"This cause came on to be tried before the Court in Chambers at Hartford, in said District, and thereupon it appears that an opinion of Hon. Wm. J. Wallace, Circuit Judge, has been filed in this cause, granting the motion to remand, which had been filed by the plaintiff;

"Therefore it is ordered by this Court that said cause be remanded to the State Court from which the same was removed, to wit: the Court of Common Pleas for Litchfield County and State of Connecticut, with costs to be taxed.

Dated at Hartford, this 20th day of May, 1890.

N. SHIPMAN, District Judge."

Eleventh. And your petitioner further alleges that said Circuit Court of the United States for the District of Connecticut in the Second Circuit, and the Judges thereof, neglect and refuse to take jurisdiction of said cause and to proceed further with the trial thereof, and to hear and determine the same, for the

reason given by His Honor Judge Wallace, as above set forth. And your petitioner further alleges that said cause is within the jurisdiction of the said Circuit Court, and that it was removable under the local prejudice clause of the Act of March 3d, 1887, although the matter in dispute does not exceed in amount the sum of $2000, exclusive of interest and costs.

Twelfth. And your petitioner further alleges that said suit has not yet been tried, and that your petitioner is entirely without remedy in the premises, unless it is afforded by the interposition of this Honorable Court.

Wherefore your petitioner prays that a writ of mandamus may be issued and directed to the Judges of said Circuit Court commanding and enjoining them to reinstate, take jurisdiction of and proceed to try and adjudge according to the law and right of the cause, said suit of Alberto T. Roraback vs. The Pennsylvania Company.

And as in duty bound your petitioner will ever pray.

DANIEL DAVENPORT,
Attorney for
THE PENNSYLVANIA COMPANY,
Petitioner.

STATE OF CONNECTICUT, *ss.* Bridgeport, Sept. 20, 1890.

Before me, personally appeared William H. O'Hara, and being first sworn in due form of law, made oath and says that he was one of the attorneys of the above named Pennsylvania Company, in said suit in the Court of Common Pleas for Litchfield County, Connecticut, and in the Circuit Court of the United States for the District of Connecticut; that he is fully acquainted with all the proceedings and records in said suit in said Courts; that he has read the foregoing petition and knows the contents thereof, and that the facts alleged therein are true

to the best of his knowledge and belief, and that he is duly authorized to make this affidavit.

SHERMAN H. HUBAARD,
Notary Public.

[SEAL.]

Supreme Court of the United States.

October Term, 1890.

EX PARTE

THE PENNSYLVANIA COMPANY,
Petitioner.

Petition for Mandamus.

Motion for leave to file Petition.

And now comes The Pennsylvania Company, the petitioner, and moves the Court for leave to file the foregoing petition, and submits thereon the accompanying brief.

Respectfully submitted.

DANIEL DAVENPORT,
Counsel for the Petitioner.

Supreme Court of the United States,

October Term, 1890.

EX PARTE

THE PENNSYLVANIA COMPANY,
Petitioner.

Petition for Mandamus.

Motion for rule to show cause.

Upon the foregoing petition, The Pennsylvania Company by its counsel, now moves that a rule be made to the Judges

of the Circuit Court of the United States for the District of Connecticut, to show cause why a writ of mandamus should not issue against them, as prayed for in said petition.

By DANIEL DAVENPORT,
its Counsel.

Supreme Court of the United States,

October Term, 1890.

EX PARTE

THE PENNSYLVANIA COMPANY,
Petitioner.

Petition for Mandamus.

Rule to show cause.

Upon the foregoing petition of The Pennsylvania Company, and upon the motion of Daniel Davenport, its Counsel, for a rule to the Judges of the Circuit Court of the United States for the District of Connecticut, to show cause to this Court why a writ of mandamus should not be issued, commanding and enjoining them to reinstate, take jurisdiction of and proceed to try and adjudge according to law and right of the case, the suit of Alberto T. Roraback vs. The Pennsylvania Company, as prayed for in said petition—

It is ordered by this Court that the said Judges show cause to this Court, on or before the day of 1890, why a writ of mandamus should not be issued, commanding and enjoining them to reinstate, take jurisdiction of and proceed to try and adjudge according to law and the right of the case said suit of Alberto T. Roraback vs. The Pennsylvania Company, as prayed for in said petition.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 7, ORIGINAL.

EX PARTE: IN THE MATTER OF THE PENNSYLVANIA COMPANY, PETITIONER.

RETURN TO RULE.

Supreme Court of the United States. October Term, 1890.

Ex Parte: In the Matter of THE PENNSYLVANIA COMPANY, Petitioner.

On petition for a writ of mandamus.

On consideration of the petition of the Pennsylvania Company, it is now here ordered by the court that cause be shown by the judges of the circuit court of the United States for the district of Connecticut before this court, on Monday, the 24th day of November, 1890, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a writ of mandamus should not issue as prayed in said petition.

October 27th, 1890.

Circuit Court of the United States, District of Connecticut.

ALBERTO T. RORABACK
v.
THE PENNSYLVANIA CO.

To the honorable the justices of the Supreme Court of the United States:

The return of the judges of the circuit court of the United States for the district of Connecticut to the foregoing rule to show cause why a mandamus should not issue.

The record, proceedings, and order whereof mention is therein made follow in these words and figures, viz:

United States Circuit Court, District of Connecticut.

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA CO.

Be it remembered that on the 22d day of April, 1890, there was filed in court a transcript of record of a cause which was removed from the court of common pleas for Litchfield county, and which is in the words and figures following, viz:

To the sheriff of the county of Hartford, his deputy, or either of the constables of the town of Hartford, within said county, Greeting:

By authority of the State of Connecticut you are hereby commanded to attach to the value of seven hundred dollars the goods or estate of the Pennsylvania Company, a non-resident corporation duly incorporated under the laws of the State of Pennsylvania and having an office and place of business in Pittsburgh, in said State of Pennsylvania, but having property in this State subject and liable to attachment, and it summon to appear before the court of common pleas, to be holden at Canaan, within and for the county of Litchfield, on the first Monday of July, A. D. 1889, then and there to answer unto Alberto T. Roraback, of the town of North Canaan, in Litchfield county aforesaid, in a civil action wherein the plaintiff complains and says:

First count.

1. On and before June 4th, 1889, the plaintiff lent $500 to the defendant.

2. And paid, laid out, and expended said sum for the defendant.

3. And sold and delivered goods, wares, and merchandise of the price and value of said sum to the defendant.

4. And bargained and sold goods, wares, and merchandise of the price and value of said sum to the defendant.

5. And performed work and rendered professional services of the price and value of said sum for the defendant.

6. And furnished materials of the price and value of said sum to the defendant.

7. And furnished board and lodging, washing, fuel, and other articles of the price and value of said sum to the defendant.

8. And furnished horses, harness, carriages, vehicles, and other property of the plaintiff to the defendant for its use for said sum.

9. And on said day the defendant had and received said sum to and for the use of the plaintiff.

—. And used and occupied certain lands, tenements, and apartments of the plaintiff by his permission, which use and occupation were reasonably worth said sum.

11. And said sum was found to be due to the plaintiff from the defendant on an account then and there stated between them.

12. Yet, though said sums are justly due to the plaintiff from the defendant, the defendant has never paid the same.

The plaintiff claims $500 damages.

The plaintiff is recognized in the sufficient sum of $100 to prosecute, &c.

Of this writ, with your doings thereon, make due return.

Dated at Winchester, Conn., this 4th day of June, 1889.

SAMUEL A. HERMAN,
Commissioner of the Superior Court for Litchfield County.

STATE OF CONNECTICUT, *Hartford County,* } *ss:*

HARTFORD, *June 17th*, 1889.

Then and by virtue hereof I attached as the property of the within-named defendant, at Hartford, two box cars of the Union Line Pennsylvania Co., number- 4549 and 486, and took the same into my possession and took a receipt for the same.

And afterwards, on the 17th day of June, 1889, I left with —— Henney, as he is the agent of said company and of the within-named defendant, a true and attested copy of the within writ, summons, and complaint, with my said doings thereon endorsed.

Attest:

A. P. MOORE,
Deputy Sheriff.

Fees:

Copies	75
Endorsement	24
Service	12
Travel	6 50
Securing property	1 00
Receipt	1 00
	$9 61

Court of Common Pleas for Litchfield County. July Term, A. D. 1889.

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA COMPANY.

Amendment to Complaint.

1. The plaintiff, being an attorney-at-law, rendered services as such for the defendant, at the defendant's request, between May first, 1887, and March 1st, 1888, under an agreement between the parties that the plaintiff should charge reasonable fees therefor, including disbursements and expenses incidental thereto, and that the defendant would pay the plaintiff the amount due on the plaintiff's account in the premises on demand.

2. The amount due on the account charged in conformity with said agreement on March first, 1888, was and still is $500, and said account has been rendered to the defendant.

3. The defendant has not paid the same.

Court of Common Pleas, Litchfield County. July Term, 1889.

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA CO.

Plaintiff's Bill of Particulars

The Penn. Co. in account with A. T. Roraback, Dr.

1887.			
May 23.	To retainer, 1 day, & ex. with Judge Fenn.		
June 1.	To 1 day, Litchfield, pleadings, &c.		
June 4.	To 1 day short calendar, Litchfield.		
" 9.	To 3 day- Litchfield trial.		
	Expenses		8 97
June 15.	To 2 days, Litchfield, argument.		
	Expenses		4 00
July 22.	To 2 days, Winsted and Canaan, finding.		
	Ex		1 30
Dec. 29.	To 3 days, Hartford, library.		
	To 3 days, brief and authorities.		
	Ex		10 05
1888.			
Jan. 3.	To 1 day, Hartford, supreme court.		
" 11.	To 2 days, " " "		
	Expenses		8 25
	Am't ex		$32 57
	To amount of claim retained, services, and expenses in full		$500 00

Court of Common Pleas, Litchfield County. July Term, 1889.

A. T. RORABACK
vs.
PENNSYLVANIA COMPANY.

Defendant's Answer to Amended Complaint.

1. As to paragraph first of the plaintiff's amended complaint, the defendant admits the employment of the plaintiff, but of the other allegations therein the defendant has not sufficient knowledge to form a belief and requires proof of the same by the plaintiff.
2. Paragraph second is denied.
3. Paragraph third is admitted.

THE DEFENDANT,
By DAVENPORT & O'HARA, *Its Att'ys.*

I, AUGUSTUS H. FENN, of the town of Winchester, in the county of Litchfield, in the State of Connecticut, of lawful age, being duly cautioned, examined, and sworn according to law, do testify and say:

Q. 1. What is your residence?
A. 1. Winsted, Conn.
Q. 2. Your profession?
A. 2. Lawyer; at present judge of the superior court.
Q. 3. When and where were you admitted to the practice of law?
A. 3. Litchfield; Feb'y 15, 1867.
Q. 4. How long were you in active practice in the State?
A. 4. From that date until the latter part of Feb'y, 1887.
Q. 5. Were you ever familiar with a certain action at one time pending in the superior court in Litchfield county, entitled Chas. E. Palmer & Wife *vs.* The Chicago, Burlington & Quincy R. R. & The Pennsylvania Co.?
A. 5. Yes.
Q. 6. What connection, if any, did you have with that case?
A. 6. Counsel for the Pennsylvania Co., one of the defendants.
Q. 7. When did your connection with that suit in that capacity terminate?
A. 7. At the time of my appointment as judge of the superior court, Feb'y, 1887.
Q. 8. Have you known anything of that case since your connection with it as an attorney terminated?
A. 8. I have.
Q. 9. What have you known of that case since that time?
A. 9. I informed the Co. of my appointment and inability to proceed further as their counsel in consequence, and suggested the appointment of other counsel in my place. I was authorized to request Brothers Roraback & Herman to so act, and I did so request. I have known, in a general way and somewhat in detail, what was done by Messrs. Roraback & Herman in the preparation of the case and in its trial, both in the superior court and afterwards in the supreme court of errors, though I was not present at such trials.

Document marked Ex. No. 1, the same being a copy of plaintiff Roraback's bill of particulars in the action in which the deposition is taken, hereto attached and made a part of this deposition, shown witness.

(Objected to by Wm. H. O'Hara, att'y for def't, being made part of the deposition for any purpose except to interrogate Judge Fenn on the charges appearing on it.)

Q. 10. The whole amount charged for retainer, service, and expenses by said Roraback against said defendant, as appears by said copy of bill of particulars, is $500. What have you to say about that charge—whether it is a reasonable one or not?

(Objected to by def't's att'y on the ground that Judge Fenn, as an expert, cannot testify as to whether such amount is a reasonable charge or not for such services.)

A. 10. I wish to say that I have no definite knowledge as to the items of days and dates and of expenses contained in the bill of particulars. From such knowledge as I have of the case, as before stated by me, it does not seem to me at all unlikely that the time stated was necessarily employed in the preparation and trial.

I have no reason to doubt, nor do I doubt, such to be the case; and, assuming this to be so, from my knowledge of the questions involved, I should say that the aggregate charge of $500 is a reasonable one.

(All of this answer down to the words "I should say" objected to as not responsive to the question and immaterial by def't's attorney.)

Cross-examined by WM. H. O'HARA, att'y for def't:

Q. 11 X. Have you any actual knowledge of any of the charges appearing upon the copy of the bill of particulars now before you?

A. 11 X. I have—certainly.

Q. 12 X. Will you state of what charges you have knowledge and what it is?

A. 12 X. I can say that Brother Roraback was entitled to charge a retainer; for, as I have already stated, I communicated to him the Pennsylvania Co.'s request that he act as counsel for them; also that he spent in consulting with me in reference to the case as much time as charged in the bill of particulars therefor, though I cannot say whether this was on the 23rd day of May or not, from present recollection or any means which I now have of refreshing my memory.

I did not see Mr. Roraback at Litchfield, but I saw him at Winsted, on his way there, on several occasions when I knew proceedings were had in court in reference to the case.

I know, of course, that Brother Roraback acted as counsel in the case; that he expended time and incurred expense in so doing; that the case was tried to a successful issue in the superior and again in the supreme court. I know considerable in reference to the preparation of his brief and the authorities cited therein. He certainly occupied much time and extreme care in such preparation. I know this, for he consulted me in regard to it on several occasions, and I took a very great interest in it.

Q. 13 X. Were you familiar with the questions of law involved in the case?

A. 13 X. I should say that I was.

Q. 14 X. Did you regard them as intricate and difficult, so far as they related to the liability of the Pennsylvania Co.?

A. 14 X. I am sorry to say that the longer I live the more intricate and difficult I regard all questions of law, and especially those in which no settled determination has been had in the court of highest resort in our own State and in regard to which the courts of other States radically differ. Such questions were involved in this case, and, besides that, the facts were in dispute in the court below; and I recollect there was some considerable discussion and, I believe,

difficulty after discussion in settling the judge's finding thereon. I would, therefore answer your question yes.

Q. 15 X. What were such difficult and intricate questions?

A. 15 X. I must say that it is somewhat too long after dinner and too near supper to dictate a legal essay; but in a general way and in all seriousness the best answer I can give — the questions discussed in the printed briefs of counsel, which, I imagine, can be easily procured and had, at the trial and the questions discussed and decided by the supreme court in the decision of the case in the Connecticut Reports, to which I would most respectfully beg leave to refer.

Q. 16 X. In answer to question 10 you say: From my knowledge of the questions involved, I should say that the aggregate charge of $500 is a reasonable one. Did you desire to be understood that such knowledge of the questions involved extends no further than appears from your answers to the two last preceding questions?

A. 16 X. My knowledge of the questions involved is such as I gained from a pretty thorough examination of the case and of the law pertaining to it before I ceased to be counsel, and from further examination and discussion with the counsel afterwards. I do not at all mean to say that my knowledge was derived from the briefs of counsel or the opinion of the court alone, for I had knowledge on the subject before either were written. I simply mean to say that what the questions were are better stated, more in detail and more clearly, in those carefully prepared papers than I can undertake to state them from my memory now.

Q. 17 X. And is it on this knowledge alone that you base your opinion that the sum of $500 is a reasonable charge for one of the attorneys in that case?

A. 17 X. That is not the only element. If Brother Roraback expended the time and money detailed in his bill of particulars, in the careful preparation and trial to a successful issue in our two highest courts, of the defendant's case, I should say that what the case involved, the questions of law and questions of fact, the charge seems to me a moderate, just, and reasonable one.

Q. 18 X. Does the fact of the cases having been decided in favor of the Pennsylvania Co. influence you in your opinion that such sum is reasonable?

A. 18 X. To this extent, that where a severely contested case, doubtful in its results, ends favorably there can be no reason why, assuming the client to be in no sense an object of charity, any reduction should be made from just charges on considerations of want of skill or want of luck.

Q. 19 X. To that extent only?

A. 19 X. I think in answering the question I have included that element to that extent only. I will not say, however, that I have not myself considered it just sometimes to consider it further.

Q. 20 X. Were you aware that the most important question of law, and perhaps the only intricate one, as appears from the decision of the learned judge of the supreme court, involved in the case had

been determined in the State of Ill. previous to the trial of the case?

A. 20 X. I am aware of a decision in Ill. affecting a question in the case; beyond that, I should say no to your interrogatory.

Q. 21 X. Was your opinion of the questions of law involved at all affected by the light of that case in Ill.?

A. 21 X. I should say it most assuredly helped the Pennsylvania Co.'s side of the case.

Q. 22 X. Do you know what the prevailing rate *per diem* for the services of an att'y in this section of the State was during the period covered by the copy of the bill of particulars?

A. 22 X. I cannot, as it seems to me, answer except by saying that while the length of time required in such work as this is a very important, and perhaps the most important, element to be considered, it is so far from being the only important one that I do not think such services are in common practice or can be in common justice measured by *per diem* charges.

(Answer objected to as not responsive to the question by def't's att'y.)

Q. 23 X. Ques. 22 repeated.

A. 23 X. I am sorry to say I can only repeat the answer.

Q. 24 X. Do you want to be understood you had no knowledge what the rate was?

A. 24 X. I do not wish to be so understood. I ought to have as much knowledge upon that subject as upon any. I have a knowledge of the height and weight of human beings, but I cannot tell arbitrarily what a person's height or weight is, as each differs from the other—cases differ, lawyers differ, the value of services differ. What would be reasonable for one man in one case would be a trifle in another and extortion in a third. I mean what the supreme court has better expressed than I can in Phelps *vs.* Hunt, in the 40th Conn. Reports. I do not think that for services of this kind there can be said to be any established and uniform *per diem* rate.

Q. 25 X. Can you say whether or not in this country there was a maximum and minimum rate *per diem* well understood and established by the bar?

A. 25 X. If you refer to services of this kind—that is, to the preparation and trial of civil causes in the superior and supreme courts—I should say emphatically there was none. There have been bar rules as to minimum fees; none, I think, as to maximum, and such rules as I have referred to were never considered as of any binding weight, and the better the lawyer, the less regard he paid or was expected to pay to them.

Q. 26 X. Then, the amount to be charged in any particular case for services rendered by any attorney was to be determined in this section by circumstances and caprice and by opinion?

A. 26 X. By circumstances certainly; by caprice certainly not.

AUGUSTUS H. FENN.

Ex. A.

Court of Common Pleas, Litchfield County. July Term, 1889.

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA CO.

Plaintiff's Bill of Particulars.

The Pennsylvania Co. in account with A. T. Roraback, Dr.

1887.			
May 23.	To retainer, ex., and one day, Judge Fenn.		
June 1.	To one day, Litchfield, pleading, &c.		
" 4.	To one day, Litchfield, short calendar.		
" 9.	To 3 days, trial, Litchfield.		
	Expenses		$8 97
" 22.	To 2 days, Litchfield, argument.		
	Expenses		4 00
July —.	To 2 days, Winsted and Canaan, finding.		
	Expenses		1 30
Dec. 29.	To 3 days, Hartford, library.		
	Expenses		10 05
	To 3 days, brief and authorities.		
1888.			
Jan. 3.	To 1 day, Hartford, supreme court.		
" 11.	To 2 " " " "		
	Expenses		8 25
	To amount of claim, retainer, services and expenses in full		$500 00

STATE OF CONNECTICUT,
County of Litchfield, Town of Winchester, } *ss:*

THE 23RD DAY OF AUGUST, A. D. 1889.

Then personally appeared the above-named August H. Fenn, signer of the foregoing deposition, and, after having been duly cautioned to speak the whole truth and carefully examined, did subscribe the same and make oath before me that the same contains the truth, the whole truth, and nothing but the truth.

The foregoing deposition is taken pursuant to the annexed notice, at the request of the plaintiff, to be read on the trial of an action pending before the court of common pleas within and for the county of Litchfield and State of Connecticut, in which action Alberto T. Roraback is plaintiff and The Pennsylvania Company defendant.

The cause of taking this deposition is the deponent is about leaving this State.

The adverse party was notified to be present at the taking of this deposition, and was present thereat by its attorney, Wm. H. O'Hara.

(Official signature and seal.)

WILLIAM F. HURLBUT,
Clerk Court of Common Pleas, Litchfield Co., Conn.

Notice to Take Deposition.

Litchfield County Court of Common Pleas.

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA COMPANY.

To the defendant in the above-entitled action and to Messrs. Davenport and O'Hara, of Bridgeport, Conn., its attorneys:

You are hereby notified that the depositions of sundry witnesses, to be used on the trial of the above-entitled action, will be taken by the plaintiff therein on the 23rd day of August, A. D. 1889, at five o'clock in the afternoon, at the law office of Samuel A. Herman, in Winsted, in the town of Winchester, county of Litchfield, and State of Connecticut, before some proper authority and at such times and places as such authority shall fix, by adjournment.

You will be present and put in interrogatories if you see fit.

Dated at Canaan, Conn., this 22nd day of August, 1889.

ALBERTO T. RORABACK, *Plaintiff.*

FAIRFIELD COUNTY, *ss:*

BRIDGEPORT, *Aug.* 22*d*, 1889.

Due and legal service of the foregeing notice is hereby acknowledged.

DAVENPORT & O'HARA,
Att'ys for Defendant.

Court of Common Pleas, Litchfield County, State of Connecticut. March Term, 1890.

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA COMPANY.

The petition of The Pennsylvania Company, defendant in the above-entitled action, respectfully represents to this honorable court that at the time of the commencement of said suit it was and still is a corporation duly organized under the laws of the State of Pennsylvania, and was and still is a citizen of the State of Pennsylvania, and that Alberto T. Roraback, the plaintiff therein, was and still is a citizen of the State of Connecticut; (that said suit is now pending for trial in this court and has not yet been tried) (amendment inserted by the court March 15, 1890); that in said suit there is a controversy between the plaintiff, a citizen of the State of Connecticut, in which said suit is brought, and the defendant, a citizen of another State, to wit, the State of Pennsylvania; that from prejudice and local influence said defendant will not be able to obtain justice in this court of common pleas for Litchfield county or in any other State court to which the said defendant, under the laws of the State of Connecticut, has the right, on account of such prejudice and local

influence, to remove said suit; that it files herewith an affidavit of Joseph Wood, of Pittsburgh, Pennsylvania, its general manager, the proper officer of the defendant, said Pennsylvania Company, that from prejudice and local influence said defendant, The Pennsylvania Company, will not be able to obtain justice in this court of common pleas of Litchfield county or in any other State court to which it has, under the laws of the State of Connecticut, a right, on account of such prejudice and local influence, to remove said cause, and that he has reason to believe and does believe that from prejudice and local influence said defendant, The Pennsylvania Company, will not be able to obtain justice in the court of common pleas for Litchfield county or in any other State court to which it has, under the laws of the State of Connecticut, a right, on account of such prejudice or local influence, to remove said cause.

Your petitioner makes and files herewith a bond, with good and sufficient surety, for his entering in the circuit court of the United States for the district of Connecticut, on the first day of its next session, a copy of the record and of the process against it, and of all pleadings, depositions, testimony, and other proceedings in said cause, and for paying all costs that may be awarded by said circuit court if said circuit court shall hold that this suit has been wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to accept this petition and said bond and order the transfer of said suit to said circuit court of the United States for the district of Connecticut.

THE PENNSYLVANIA COMPANY,
By JOSEPH WOOD, *General Manager, and*
DAVENPORT & O'HARA, *Its Attorneys.*

In the Court of Common Pleas for Litchfield County, State of Connecticut.

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA COMPANY.

I, Joseph Wood, of Pittsburgh, in the State of Pennsylvania, being duly sworn, do depose and say that I am the general manager of The Pennsylvania Company, defendant in the above-entitled action; that from prejudice and local influence said defendant will not be able to obtain justice in this court of common pleas for Litchfield county or in any other State court to which the said defendant, under the laws of the State of Connecticut, has the right, on account of such prejudice and local influence, to remove said cause, and that I have reason to believe and do believe that from prejudice and local influence said defendant, The Pennsylvania Company, will not be able to obtain justice in said court of common pleas for Litchfield county or in any other State court to which it has, under the laws of the State of Connecticut, a right, on account of such prejudice and local influence, to remove said cause, and that I am duly

authorized by said defendant, The Pennsylvania Company, to make this affidavit.

JOSEPH WOOD.

Subscribed by the said Joseph Wood in my presence and by him sworn to before me this fifth day of March, 1890.

WM. F. ROBB,
[SEAL.] *Commissioner for the State of Connecticut in Pittsburgh, Penns.*

Know all men by these presents that the Pennsylvania Company, a corporation duly organized under the laws of the State of Pennsylvania, as principal, and Smith P. Glover, of Newtown, county of Fairfield, and State of Connecticut, as surety, are held and firmly bound unto Alberto T. Roraback, of Canaan, county of Litchfield, and State of Connecticut, in the penal sum of 500 dollars; for the payment whereof, well and truly to be made unto the said Alberto T. Roraback, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, assigns, and successors, jointly and severally, firmly by these presents—

Yet upon these conditions: The said Pennsylvania Company having petitioned the court of common pleas for Litchfield county, State of Connecticut, for the removal of a certain cause therein pending, wherein Alberto T. Roraback is plaintiff and The Pennsylvania Company is defendant, to the circuit court of the United States in and for the district of Connecticut:

Now, if the said Pennsylvania Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record, process, pleadings, depositions, testimony, and other proceedings in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this fifth day of March, 1890.

[SEAL.] THE PENNSYLVANIA COMPANY,
By J. W. McCULLUGH, *Vice-President.*
SMITH P. GLOVER. [L. S.]

Attest:
S. B. LIGGETT, *Secretary.*
R. P. BELDEN,
Witness to Smith P. Glover's signature.

FAIRFIELD COUNTY, *ss:*

BRIDGEPORT, *March* 8, 1890.

Personally appeared Smith P. Glover, of Newtown, Connecticut, surety in the above bond, and made oath that he is the owner in fee simple of real estate situated in said town of Newtown which is

worth more than $5,000, and that the same is free from all incumbrances whatsoever. Before me—

WM. H. O'HARA,
Commissioner of the Superior Court for Fairfield County.

Filed March 10th, 1890.

Court of Common Pleas, Litchfield County, State of Connecticut.
March Term, 1890.

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA COMPANY.

Objection and remonstrance by the plaintiff to the removal of the above-entitled cause to the circuit court of the United States.

The plaintiff hereby objects to and remonstrates against the removal of the above-entitled cause and action to the circuit court of the United States for the district of Connecticut for the following reasons, namely:

1. Because said circuit court has no jurisdiction of said cause or action, neither can it acquire any jurisdiction by the defendant's proceedings for removal.

2. Because it does not appear from any evidence offered in court that there is any local prejudice or influence which will prevent the defendant from obtaining justice in the State court or courts.

3. Because there is no prejudice or local influence to prevent or obstruct the defendant from obtaining justice in said State court of common pleas of Litchfield county, Connecticut, or in any other State court in said Connecticut to which the said defendant may under the laws of the State of Connecticut have the right to remove said cause.

4. Because it does not appear from the record in said cause that the subject-matter involved or in dispute is over five hundred dollars in amount and not within the jurisdiction of the said circuit court of the United States.

5. Because it does not appear from the record in said cause that the subject-matter involved and in dispute, exclusive of interest and costs, does not exceed the sum or value of five hundred dollars.

6. Because the petition and proceedings for said removal do not state or set forth whether said suit or cause has or has not been tried.

7. Because the said petition and proceedings for said removal does not state or allege the purpose or nature of said suit or cause sought to be removed or the relief asked or prayed for therein.

8. Because said proceedings for removal are subsequent to the filing of the answer and pleadings by the defendant to the declaration and complaint of the plaintiff and subsequent to the time when the defendant is required by the laws of the State of Connecticut and the rules of said court of common pleas to plead and answer to

the declaration and complaint of the plaintiff and subsequent to the trial of said cause.

9. Because it does not appear from the pretended affidavit upon what grounds the affiant bases his belief, or whether he is or has been in a position to judge or know whether any prejudice or local influence exists to prevent the defendant from being able to obtain justice in said court of common pleas or in some Connecticut State court which by the laws of Connecticut the defendant has a right to remove said cause.

10. Because there is no affidavit by the defendant that the defendant believes that from the prejudice or local influence the defendant will not be able to obtain justice in the court of common pleas for Litchfield county, Connecticut, or in any other Connecticut State court to which said defendant may under the laws of said State of Connecticut have the right to remove the same.

11. Because it does not appear that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

Filed M'ch 14, 1890.

ALBERTO T. RORABACK,
By SAMUEL A. HERMAN,
His Attorney.

Court of Common Pleas, Litchfield County, State of Connecticut.

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA COMPANY.

Order for removal of said case to the circuit court of the United States for the district of Connecticut, in the second circuit.

Upon reading and filing the petition of the above-named Pennsylvania Company, defendant herein, for the removal of the suit into the circuit court of the United States for the district of Connecticut, in the second district, in pursuance of the laws of the United States relating to the removal of suits from the State courts on the ground of prejudice and local influence (before the trial thereof in this court) (amendment by the court March 15, 1890), and upon filing the affidavit of Joseph Wood, the proper officer of the defendant corporation, that on account of such prejudice and local influence the defendant will not be able to obtain justice in said State court or in any other State court to which it has the right under the laws of the State of Connecticut, on account of such prejudice and local influence, to remove said suit, and that he believes that from prejudice and local influence the defendant will not be able to obtain justice in said State court nor in any other State court to which it has the right under the laws of the State of Connecticut, on account of such prejudice and local influence, to remove said said suit, and upon filing the security offered by said defendant, according to the requirements of the laws of the United States, and,

on motion of Davenport and O'Hara, the attorneys for said defendant, it is hereby ordered that the said security be accepted and the said suit be removed into the next circuit court of the United States to be held in said district of Connecticut, and that no further proceedings be had in said suit in this court.

Witness the Honorable Albert P. Bradstreet, judge of the district court of Waterbury, acting judge of the court of common pleas for Litchfield county, and the seal thereof, this 15th day of March, 1890.

Byt he court:

[SEAL.] WM. F. HURLBUT, *Clerk.*

Court of Common Pleas, Litchfield County.

STATE OF CONNECTICUT, } ss:
County of Litchfield, }

I, Wm. F. Hurlbut, clerk of the court of common pleas for the county of Litchfield aforesaid, do certify that the within and foregoing is a true copy of the original complaint, pleadings, depositions of Augustus H. Fenn, petition of the defendant for the removal to the circuit court of the United States for the district of Connecticut, remonstrance of plaintiff thereto, and order of the court thereon in the case of Alberto T. Roraback *vs.* The Pennsylvania Company, as on file and record in the clerk's office of said court of common pleas.

In witness whereof I hereunto set my hand officially and affix the seal of said court of common pleas, at Winchester, in the county and State aforesaid, this 17th day of March, 1890.

[SEAL.] WM. F. HURLBUT, *Clerk.*

And on the same day petition for removal was filed in the words and figures following, viz:

ALBERTO T. RORABACK }
vs.
THE PENNSYLVANIA COMPANY. }

To the honorable the circuit court of the United States for the district of Connecticut, in the second circuit:

The petition of the Pennsylvania Company, a corporation duly organized under the laws of the State of Pennsylvania and a citizen of said State of Pennsylvania, respectfully shows that Alberto T. Roraback, of the town of Canaan, county of Litchfield, and State of Connecticut, a citizen of said State of Connecticut, brought an action as sole plaintiff against your petitioner, the said Pennsylvania Company, as sole defendant, in the court of common pleas for Litchfield county, in the State of Connecticut, a State court of said State of Connecticut, at its term commencing on the first Monday of July, 1889; that at the time of the commencement of said suit the said Alberto T. Roraback, plaintiff therein, was and still is a citizen of the State of Connecticut, and the said The Pennsylvania Company was and still is a citizen of the State of Pennsylvania; that in

said suit there is a controversy between a citizen of the State of Connecticut, in which said suit is brought, and a citizen of another State, to wit, the State of Pennsylvania; that from prejudice against the defendant and from the local influence of the said plaintiff your petitioner, said The Pennsylvania Company, will not be able to obtain justice in said court of common pleas for Litchfield county, in the State of Connecticut, nor in any other State court to which under the laws of the State of Connecticut the defendant has the right, on account of such prejudice and local influence, to remove said cause; that said cause has not yet been tried in said court of common pleas for Litchfield county, in the State of Connecticut, and that said suit is still pending in said court for trial, unless it has been removed to this court by virtue of the proceedings heretofore had in said State court hereinafter set forth; that your petitioner desires to remove said cause, before the trial thereof, into the circuit court of the United States for the district of Connecticut, in the second circuit, in pursuance of the provisions of law as contained in the act of Congress approved August 13, 1888, being chapter 886 of the acts of the 50th Congress of the United States, and of the other acts of Congress of which said act is amendatory; that on March 18th, 1890, while said suit was still pending in the said court of common pleas for Litchfield county, in the State of Connecticut, and before the trial thereof, your petitioner, the said The Pennsylvania Company, filed in said court its petition for the removal of said cause from said court of common pleas to the circuit court of the United States for the district of Connecticut, which petition was as follows:

Court of Common Pleas, Litchfield County, State of Connecticut.
March Term, 1890.

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA COMPANY.

The petition of The Pennsylvania Company, defendant in the above-entitled action, respectfully represents to this honorable court that at the time of the commencement of said suit it was and still is a corporation duly organized under the laws of the State of Pennsylvania and was and still is a citizen of the State of Pennsylvania, and that Alberto T. Roraback, the plaintiff therein, was and still is a citizen of the State of Connecticut; that said suit is now pending for trial in this court and has not yet been tried; that in said suit there is a controversy between the plaintiff, a citizen of the State of Connecticut, in which said suit is brought, and the defendant, a citizen of another State, to wit, the State of Pennsylvania; that from prejudice and local influence said defendant will not be able to obtain justice — this court of common pleas for Litchfield county or in any other State court to which the said defendant, under the laws of the State of Connecticut, has the right, on account of such prejudice and local influence, to remove said

suit; that it files herewith an affidavit of Joseph Wood, of Pittsburgh, Pennsylvania, its general manager, the proper officer of the defendant, said Pennsylvania Company, that from prejudice and local influence said defendant, The Pennsylvania Company, will not be able to obtain justice in this court of common pleas of Litchfield county or in any other State court to which it has, under the laws of the State of Connecticut, a right, on account of such prejudice and local influence, to remove said cause, and that he has reason to believe and does believe that from prejudice and local influence said defendant, The Pennsylvania Company, will not be able to obtain justice in the court of common pleas for Litchfield county or in any other State court to which it has, under the laws of the State of Connecticut, a right, on account of such prejudice or local influence, to remove said cause. Your petitioner makes and files herewith a bond, with good and sufficient surety, for his entering in the circuit court of the United States for the district of Connecticut, on the first day of its next session, a copy of the record and the process against it and of all pleadings, depositions, testimony, and other proceedings in said cause and for paying all costs that may be awarded by said circuit court if said circuit court shall hold that this suit has been wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to accept this petition and said bond and order the transfer of said suit to said circuit court of the United States for the district of Connecticut.

THE PENNSYLVANIA COMPANY,
By JOSEPH WOOD, *General Manager, and*
DAVENPORT & O'HARA, *Its Attorneys.*

That on said day, at the time of filing said petition, your petitioner filed in said court of common pleas the affidavit of Joseph Wood, the general manager of your petitioner, its proper officer thereunto duly authorized, that on account of such prejudice and local influence The Pennsylvania Company, your petitioner, the defendant in said suit, would not be able to obtain justice in the said court of common pleas for Litchfield county nor in any other State court to which the defendant, under the laws of the State of Connecticut, has the right, on account of such prejudice and local influence, to remove said cause, and that he had reason to believe and did believe that the defendant, your petitioner, would not be able to obtain justice in said State courts on account of such prejudice and local influence, which affidavit was as follows:

"In the Court of Common Pleas for Litchfield County, State of Connecticut.

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA COMPANY.

I, Joseph Wood, of Pittsburgh, in the State of Pennsylvania, being duly sworn, do depose and say that I am the general manager of

The Pennsylvania Company, defendant in the above-entitled action; that from prejudice and local influence said defendant will not be able to obtain justice in this court of common pleas for Litchfield county or in any other State court to which the said defendant, under the laws of the State of Connecticut, has the right, on account of such prejudice and local influence, to remove said cause, and that I have reason to believe and do believe that from prejudice and local influence said defendant, The Pennsylvania Company, will not be able to obtain justice in said court of common pleas for Litchfield county or in any other State court to which it has, under the laws of the State of Connecticut, a right, on account of such prejudice and local influence, to remove said cause, and that I am duly authorized by said defendant, The Pennsylvania Company, to make this affidavit.

JOSEPH WOOD.

Subscribed by the said Joseph Wood in my presence and by him sworn to before me this fifth day of March, 1890.

[SEAL.] WILLIAM F. ROBB,
Commissioner for the State of Connecticut in Pittsburgh, Penn."

That at the time of filing said petition in said court of common pleas for Litchfield county your petitioner offered a bond in said court, with good and sufficient surety, for its entering in said circuit court of the United States for the district of Connecticut on the first day of its next session a copy of the record, process, pleadings, depositions, testimony, and other proceedings in said suit, which bond was as follows:

"Know all men by these presents that the Pennsylvania Company, a corporation duly organized under the laws of the State of Pennsylvania, as principal, and Smith P. Glover, of Newtown, county of Fairfield and State of Connecticut, as surety, are held and firmly bound unto Alberto T. Roraback, of Canaan, county of Litchfield and State of Connecticut, in the penal sum of $500 *dollars;* for the payment whereof, well and truly to be made unto the said Alberto T. Roraback, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, assigns, and successors, jointly and severally, firmly by these presents—

Yet upon these conditions: The said Pennsylvania Company having petitioned the court of common pleas for Litchfield county, State of Connecticut, for the removal of a certain cause therein pending, wherein Alberto T. Roraback is plaintiff and The Pennsylvania Company is defendant, to the circuit court of the United States in and for the district of Connecticut:

Now, if the said Pennsylvania Company, your petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record, process, pleadings, depositions, testimony, and other proceedings in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was

wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this fifth day of March, 1890.

THE PENNSYLVANIA COMPANY,
By J. W. McCULLUGH, *Vice-President.*
SMITH P. GLOVER. [L. S.]

Attest:
S. B. LIGGETT, *Secretary.*
R. B. BELDEN,
Witness to Smith P. Glover's signature.

FAIRFIELD COUNTY, *ss:*

BRIDGEPORT, *March* 8, 1890.

Personally appeared Smith P. Glover, of Newtown, Connecticut, surety in the above bond, and made oath that he is the owner in fee simple of real estate situated in said town of Newtown which is worth more than $5,000, and that the same is free from all incumbrances whatsoever.

Before me—

WM. H. O'HARA,
Commissioner of the Superior Court for Fairfield County."

That on the 15th day of March, 1890, the said court of common pleas for Litchfield county, in the State of Connecticut, after hearing and after due notice to the plaintiff, had approved said bond and surety and ordered said cause transferred to the United States circuit court for the district of Connecticut, and that no further proceedings be had in said court of common pleas for Litchfield county, in the State of Connecticut, which order was as follows:

"Court of Common Pleas, Litchfield County, State of Connecticut.

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA COMPANY.

Order for the removal of said case to the circuit court of the United States for the district of Connecticut, in the second circuit.

Upon reading and filing the petition of the above-named Pennsylvania Company, defendant herein, for the removal of the suit into the circuit court of the United States for the district of Connecticut, in the second district, in pursuance of the laws of the United States relating to the removal of suits from the State courts on the ground of prejudice and local influence, before the trial thereof in this court, and upon filing the affidavit of Joseph Wood, the proper officer of the defendant corporation, that on account of such prejudice and local influence the defendant will not be able to obtain justice in said State court or any other State court to which it has the right, under the laws of the State of Connecticut, on account of such prejudice and local influence, to remove said suit, and that he be-

lieves that from such prejudice and local influence the defendant will not be able to obtain justice in said State court nor in any other State court to which it has the right, under the laws of the State of Connecticut, on account of such prejudice and local influence, to remove said suit, and upon filing the security offered by said defendant, according to the requirements of the laws of the United States, and on motion of Davenport and O'Hara, the attorneys for said defendant, it is hereby ordered that the said security be accepted and the said suit be removed into the next circuit court of the United States to be held in said district of Connecticut, and that no further proceedings be had in said suit in this court.

Witness the Honorable Albert P. Bradstreet, judge of the district court of Waterbury, acting judge of the court of common pleas for Litchfield county, and the seal thereof this 15th day of March, 1890.

By the court:

[SEAL.] W. F. HURLBUT, *Clerk.*"

That your petitioner has filed in this court, on this the first day of its next session after said petition was presented to said court of common pleas, a copy of the record of said cause and of the process, pleadings, depositions, testimony, and other proceedings in said suit in said court of common pleas for Litchfield county, Connecticut.

Wherefore your petitioner prays that the said suit may be removed into the circuit court of the United States for the district of Connecticut, in the second circuit, and that this court will take jurisdiction of said cause.

The Pennsylvania Company, your petitioner, files herewith the affidavit of Joseph Wood, of Pittsburgh, county of Allegheny and State of Pennsylvania, its general manager, in support of the averment of prejudice and local influence contained in the foregoing petition.

Dated at Bridgeport, Conn., this 21st day of April, A. D. 1890.

THE PENNSYLVANIA COMPANY,
By DAVENPORT & O'HARA,
Its Attorneys.

In the Circuit Court of the United States for the District of Connecticut.

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA COMPANY.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, Joseph Wood, of Pittsburgh, in the county of Allegheny and State of Pennsylvania, being duly sworn, do depose and say that I am the general manager of The Pennsylvania Company, defendant in the above-entitled cause; that the plaintiff in said cause resides in the town of Canaan, in the county of Litchfield and State of

Connecticut, and has been for a number of years an attorney-at-law, with an office in said town of Canaan; that he has an extensive and influential acquaintance in said county of Litchfield and throughout said State of Connecticut, both as an attorney and as a politician.

That he is now and has been ever since the — day of September, 1889, the sole judge of the court of common pleas for said county of Litchfield, in which court the above-entitled cause is pending for trial; that as such judge he has the power and it is his duty to designate some other judge to try said cause, and that the said defendant company is without any power in the premises whatsoever; that said cause is on the jury docket of said court for trial, and that jurors for said court must be electors and inhabitants of said county; that many of said jurors now and in the future may have causes pending in said court of common pleas for said Litchfield county before the plaintiff as judge of said court for trial; that many of said jurors have been and some of them still are clients, personal friends, companions, and relatives of the said plaintiff; that the plaintiff as such judge and the clerk of this court have the opportunity in the selection of a jury for the trial of said cause to designate from what town or towns in said county of Litchfield the necessary jurors shall be drawn and summoned.

That the defendant in the above-entitled cause is a railroad corporation, and as such was a defendant in a certain action, entitled Harry E. Palmer and wife *vs.* The Chicago, Burlington and Quincy railroad and the Pennsylvania Company, which action was tried in the superior court in said county of Litchfield and afterwards in the supreme court of errors of said State of Connecticut; that during the trial of said Palmer case in both of said courts the local press of said county—that is to say, the Litchfield Enquirer, a weekly paper published at Litchfield and having a large circulation throughout said country, and other papers—commented at large upon said Palmer case and adversely to the interests of the Pennsylvania Company; that the said Alberto T. Roraback has great local influence in said court of common pleas, in which the above-entitled action is pending; that there is prejudice existing against the said Pennsylvania Company, the defendant in said cause, in said court of common pleas in said county and State; that from such prejudice existing against the said defendant and from the local influence of the said plaintiff said defendant will not be able to obtain justice in said court of common pleas for Litchfield county or in any other State court to which the said defendant has the right, on account of such prejudice against the defendant and on account of the local influence of the plaintiff, to remove said cause, and that I am duly authorized by said defendant, The Pennsylvania Company, to make this affidavit.

JOSEPH WOOD.

Subscribed by the said Joseph Wood in my presence and by him affirmed to before me this 16th day of April, A. D. 1890, at Pittsburgh, Pennsylvania.

[SEAL.]

S. C. McCANDLESS,
U. S. Commissioner, Western District of Penna.

And on the same day motion to remand was filed in the words and figures following, viz:

Circuit Court of the United States, District of Connecticut. April Term, 1890.

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA COMPANY.

Motion to Remand to State Court.

The plaintiff in the above-entitled cause moves the court to remand the same to the State court from which it was removed, to wit, to the court of common pleas for Litchfield county, in the State of Connecticut, for the following reasons:

First. It appears from the record in the cause that the matter in dispute does not exceed, exclusive of costs, the sum or value of two thousand dollars, but is only equal to the sum or value of five hundred dollars, and that the cause is not within the jurisdiction of this court.

Second. Because the petition for removal was not in the State court filed before the time in which the defendant is by the laws of the State of Connecticut required to answer or plead, nor was the same filed in said court before the trial of the cause, but said petition was filed after the time limited for answer and plea as aforesaid and after the trial of the cause in the State court.

Third. Because neither from the record in the cause nor from any facts alleged in the affidavit attached to the petition for removal nor in any other manner has it been made to appear, nor does it appear to this court, that the defendant, on account of prejudice or local influence, will not be able to obtain justice in the court of common pleas for Litchfield county, Connecticut, or in any other State court to which the cause is by the laws of that State removable; and the plaintiff denies the existence of such prejudice or local influence, and denies that the defendant cannot in the State court as aforesaid obtain justice in the cause.

PLAINTIFF,
By LEWIS E. STANTON, *Attorney.*

And at the term of said court held at New Haven, on the fourth Tuesday of April, 1890, to wit, on the 22d day of April, the parties, with their respective counsel, duly appeared and said motion to remand was fully heard; and on the 16th day of May, 1890, opinion of court thereon was filed in the words and figures following, viz:

United States Circuit Court, District of Connecticut.

RORABACK
vs.
THE PENNSYLVANIA COMPANY.

HERMAN
vs.
THE PENNSYLVANIA COMPANY.

WALLACE, *J.*:

The question in these cases is whether under the local-prejudice clause of the act of March 3, 1887, the matter in dispute must exceed in amount the sum of $2,000 to entitle the defendant to remove the suit from a State court. This question has been considered in several of the circuits, with a diversity of opinion as to the true construction of the clause. My own views accord with those expressed by Mr. Justice Harlan in Malone *v.* Richmond & D. R. R. Co. (35 Fed. Rep., 625), and it is unnecessary to reiterate his reasons for the conclusion reached. I think it was the intention of Congress to place the right of removal for local prejudice upon the jurisdictional basis of all other removable controversies, discriminating in favor of the defendant only as to the time of making the application and permitting a single defendant to remove.

The motion to remand is granted.

L. E. Stanton for the plaintiffs; Davenport & O'Hara for the defendant.

And on the same day order to remand to court of common pleas for Litchfield county was made and filed in the words and figures following, viz:

Circuit Court of the United States, District of Connecticut. April Term, 1890.

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA COMPANY.

Order to Remand to State Court.

This cause came on to be tried before the court in chambers, at Hartford, in said district; and thereupon it appears that an opinion of Hon. W. J. Wallace, circuit judge, has been filed in the cause granting the motion to remand, which has been filed by the plaintiff.

Therefore it is now ordered by the court that said cause be remanded to the State court from which the same was removed, to wit, to the court of common pleas for Litchfield county and State of Connecticut, with costs to the plaintiff, to be taxed.

Dated at Hartford, Conn., this 20th day of May, 1890.

N. SHIPMAN,
District Judge.

UNITED STATES OF AMERICA, } ss:
District of Connecticut, }

I, Edwin E. Marvin, clerk of the circuit court of the United States for the district of Connecticut, do certify that the annexed paper is a true copy of the original proceedings and order, whereof mention is therein made, in the matter of Alberto T. Roraback *vs.* The Pennsylvania Company, No. 369, law, recorded and on file in said court.

In testimony whereof I have set hereto my name officially and the seal of said court, at Hartford, in said district, this 11th day of November, A. D. 1890.

[SEAL.]

E. E. MARVIN, *Clerk.*

And for further return to said rule to show cause the respondents show as follows:

That said petition addressed to the circuit court by the defendant, The Pennsylvania Company, alleging that from prejudice and local influence the defendant will not be able to obtain justice in the State court to which the suit was brought or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause, was filed in the circuit court on the first day of its term, held at New Haven on the fourth Tuesday of April, 1890, and, as respondents are informed, was never served upon the plaintiff therein; that no hearing has been had upon the allegations of said petition, nor has it been made in any manner to appear to the circuit court that the defendant will not, for the reasons aforesaid, be able to obtain justice in the State court, except by the affidavit of Joseph Wood, the general manager of the defendant corporation, which appears in the record attached to the petition for the removal of the cause.

And these respondents further say that the question whether the cause should be remanded to the State court was tried in the circuit court only upon the motion to remand, which was filed in the cause by the plaintiff therein, and no hearing was had upon the foregoing petition or inquiry made as to the truth of the same, because the matter in dispute in said suit does not exceed the sum or value of two thousand dollars, and is not more than five hundred dollars; and thereupon the judges of the circuit court were and are of the opinion that under the act of Congress of March 3d, 1887, as amended by the act of August 13th, 1888, a cause is not removable from a State court to this court unless the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, although the removal be sought under the local-prejudice clause of the act, for the reasons set for by the circuit judge and which appear in the record aforesaid.

And these respondents further say that they have set forth the record in the cause and also the above facts, which are hereby made part of this return and are found to be the facts in the cause, and they respectfully say that a mandamus ought not to issue requiring them to reinstate, take jurisdiction of, or to proceed to try or adjudge the said suit.

Dated at Hartford, in the State and district of Connecticut, this 10th day of November, 1890.

All which is respectfully submitted.

WILLIAM J. WALLACE,
Circuit Judge.
N. SHIPMAN, *District Judge.*

(Endorsed:) Supreme Court U. S. 1890, October term. No. 7, original. *Ex parte:* In the matter of the Pennsylvania Company, petitioner. Return to rule to show cause. Filed Nov. 14, 1890.

No 2

Supreme Court of the United States,

October Term, 1890.

EX PARTE

IN RE

THE PENNSYLVANIA COMPANY,

PETITIONER.

PETITION FOR MANDAMUS.

The petition of the Pennsylvania Company, a corporation duly organized under the laws of the State of Pennsylvania, and a citizen thereof, respectfully shows to this Honorable Court;

First. That Alberto T. Roraback, a citizen of the State of Connecticut, is the judge of the Court of Common Pleas for Litchfield County, in said State of Connecticut, and that under the law of the State of Connecticut, in a suit brought in said State Court, in which there is a controversy between a citizen of said State of Connecticut and a citizen of another State, the defendant, being such citizen of another State, has not the right, on account of prejudice or local influence, to remove said suit into any other State Court;

Second. That Samuel A. Hermann, then and ever since and now a citizen of said State of Connecticut, as sole plaintiff, through the said Roraback, his attorney, by writ dated and issued on

the 4th day of June, 1889, and returnable on the 1st Monday of July, 1889, brought a suit at law against your petitioner, then and ever since and now a citizen of the State of Pennsylvania, as sole defendant in said Court of Common Pleas for Litchfield County, in the State of Connecticut, a State Court and within the District of Connecticut, at its term commencing on the 1st Monday of July, 1889;

Third. That your petitioner appeared to defend said suit and filed its answer therein in said Court, and that by due continuances said suit came to the March term, 1890, of said Court and was then pending therein and upon the docket of said Court;

Fourth. That in said suit there was and is a controversy between a citizen of the State in which the suit was brought, to wit: the said Hermann, plaintiff, and a citizen of another State, to wit: your petitioner, the defendant; and that the matter in dispute in said suit was $500, exclusive of interest and costs;

Fifth. That during said March term, 1890, of said Court, and while said suit was pending therein and before the trial thereof, your petitioner made and filed in said Court a petition in said suit, addressed to said Court, for the removal of said suit to the United States Circuit Court for the District of Connecticut, and alleged in said petition as the ground of such removal that from prejudice against your petitioner, the defendant in said suit, and from the local influence of the said Hermann and the said Roraback, his attorney, the plaintiff therein, your petitioner would not be able to obtain justice in said State Court, or in any other State Court to which the said defendant had the right under the laws of the State of Connecticut, on account of such prejudice and local influence, to remove said cause, and made and filed therewith an affidavit of the proper officer of your petitioner, showing that he had reason to believe and did believe, that from prejudice and local influence, the defendant, your petitioner, would not be able to obtain justice in said

State Court, nor in any other State Court to which it had the right under the laws of said State of Connecticut, on account of such prejudice and local influence, to remove said cause, and further showing the existence of such prejudice and local influence, and that on account of them it would not be able to obtain justice in said State Courts; and your petitioner also made and filed therewith a bond with good and sufficient surety for its entering in said Circuit Court of the United States for the District of Connecticut, on the first day of its next session, a copy of the record in said suit, and for paying all costs that might be awarded by said Circuit Court, if said Court should hold that said suit was improperly removed;

Sixth. That afterwards, to wit: on the 15th day of March, 1890, said Court of Common Pleas for Litchfield County, after hearing had, accepted said petition and bond, and granted the prayer of said petition, and ordered that said suit be removed to the said Circuit Court of the United States for the District of Connecticut, and that no further proceedings be had in said State Court;

Seventh. That afterwards, at the opening of said Circuit Court on the 1st day of its next session, being the 4th Tuesday of April, 1890, your petitioner entered in said Circuit Court a full copy of the record in said suit, and on the same day your petitioner filed in said Circuit Court a petition addressed to it, reciting the various steps above mentioned taken by your petitioner to secure the removal of said cause from said State Court to said Circuit Court, and farther alleging that from prejudice against the defendant, your petitioner, and the local influence of the plaintiff in said suit, your petitioner said defendant would not be able to obtain justice in said State Court, nor in any other State Court to which the defendant in said suit might, under the laws of the State of Connecticut have the right on account of such prejudice and local influence, to remove said cause; and further praying said Circuit Court to take jurisdiction of said suit and to remove the same from said State Court, if the same had not already been removed into said Circuit Court

from said State Court, by the before mentioned steps already taken by your petitioner, and by the action of said State Court in ordering said removal and staying all further proceedings in said State Court in said suit; and at the same time with the filing of said petition to the Circuit Court, your petitioner filed in said Circuit Court an affidavit of the proper officer of your petitioner, setting forth all the facts which proved the existence of such prejudice and local influence in said State Court, and that on account of such prejudice and local influence, the defendant, your petitioner, would not be able to obtain justice in said State Court, or in any other State Court to which it had the right, under the laws of the State of Connecticut, on account of such prejudice and local influence, to remove said cause;

Eighth. That by said petitions and affidavits, your petitioner made it to appear to said Circuit Court that from prejudice and local influence it would not be able to obtain justice in said suit in said Court of Common Pleas for Litchfield County, in the State of Connecticut, or in any other State Court to which your petitioner had the right under the laws of the State of Connecticut, to remove said cause, on account of such prejudice and local influence; and that said suit was duly entered upon the docket of said Circuit Court;

Ninth. That thereafter the plaintiff in said suit made a motion in said Circuit Court, before the Honorable William J. Wallace, holding said Court, to remand the same to said State Court, on the ground that the amount in dispute in said suit did not exceed the sum of $2000, exclusive of interest and costs. Whereupon after hearing had, Judge Wallace, on the 16th of May, 1890, filed the following opinion: "The question in this case is whether, under the local prejudice clause of the Act of March 3d, 1887, the matter in dispute must exceed in amount the sum of $2000 to entitle the defendant to remove

the suit from a State Court. This question has been considered in several of the Circuits with a diversity of opinion as to the true construction of the clause. My own views accord with those expressed by Mr. Justice Harlan in Malone vs. The Richmond & D. R. R. Co. (35 Fed. Rep. 625,) and it is unnecessary to reiterate his reasons for the conclusion reached. I think it was the intention of Congress to place the right of removal for local prejudice upon the jurisdictional basis of all other removable controversies, discriminating in favor of the defendant, only as to the time of making the application and permitting a single defendant to remove. The motion to remand is granted."

Tenth. That afterwards, on the 20th day of May, 1890, the following order was entered in said cause in said Circuit Court:

"SAMUEL A. HERMANN *vs.* THE PENNSYLVANIA COMPANY.	Circuit Court of the United States, District of Connecticut, April Term, 1890.

Order to remand to State Court.

"This cause came on to be tried before the Court in Chambers at Hartford, in said District, and thereupon it appears that an opinion of Hon. Wm. J. Wallace, Circuit Judge, has been filed in this cause, granting the motion to remand, which had been filed by the plaintiff;

"Therefore it is ordered by this Court that said cause be remanded to the State Court from which the same was removed, to wit: the Court of Common Pleas for Litchfield County and State of Connecticut, with costs to be taxed.

Dated at Hartford, this 20th day of May, 1890.

N. SHIPMAN, District Judge."

Eleventh. And your petitioner further alleges that said Circuit Court of the United States for the District of Connecticut in the Second Circuit, and the Judges thereof, neglect and refuse to take jurisdiction of said cause and to proceed further with the trial thereof, and to hear and determine the same, for the

reason given by His Honor Judge Wallace, as above set forth. And your petitioner further alleges that said cause is within the jurisdiction of the said Circuit Court, and that it was removable under the local prejudice clause of the Act of March 3d, 1887, although the matter in dispute does not exceed in amount the sum of $2000, exclusive of interest and costs.

Twelfth And your petitioner further alleges that said suit has not yet been tried, and that your petitioner is entirely without remedy in the premises, unless it is afforded by the interposition of this Honorable Court.

Wherefore your petitioner prays that a writ of mandamus may be issued and directed to the Judges of said Circuit Court commanding and enjoining them to reinstate, take jurisdiction of and proceed to try and adjudge according to the law and right of the cause, said suit of Samuel A. Hermann vs. The Pennsylvania Company.

And as in duty bound your petitioner will ever pray.

DANIEL DAVENPORT,
Attorney for
THE PENNSYLVANIA COMPANY,
Petitioner.

STATE OF CONNECTICUT, *ss.* Bridgeport, Sept. 20, 1890.

Before me, personally appeared William H. O'Hara, and being first sworn in due form of law, made oath and says that he was one of the attorneys of the above named Pennsylvania Company, in said suit in the Court of Common Pleas for Litchfield County, Connecticut, and in the Circuit Court of the United States for the District of Connecticut; that he is fully acquainted with all the proceedings and records in said suit in said Courts; that he has read the foregoing petition and knows the contents thereof, and that the facts alleged therein are true

to the best of his knowledge and belief, and that he is duly authorized to make this affidavit.

SHERMAN H. HUBAARD,
[SEAL.] Notary Public.

Supreme Court of the United States.

October Term, 1890.

EX PARTE
THE PENNSYLVANIA COMPANY,
Petitioner.

Petition for Mandamus.

Motion for leave to file Petition.

And now comes The Pennsylvania Company, the petitioner, and moves the Court for leave to file the foregoing petition, and submits thereon the accompanying brief.

Respectfully submitted.

DANIEL DAVENPORT,
Counsel for the Petitioner.

Supreme Court of the United States,

October Term, 1890.

EX PARTE
THE PENNSYLVANIA COMPANY,
Petitioner.

Petition for Mandamus.

Motion for rule to show cause.

Upon the foregoing petition, The Pennsylvania Company by its counsel, now moves that a rule be made to the Judges

of the Circuit Court of the United States for the District of Connecticut, to show cause why a writ of mandamus should not issue against them, as prayed for in said petition.

By DANIEL DAVENPORT,
its Counsel.

Supreme Court of the United States,

October Term, 1890.

EX PARTE

THE PENNSYLVANIA COMPANY,
Petitioner.

Petition for Mandamus.

Rule to show cause.

Upon the foregoing petition of The Pennsylvania Company, and upon the motion of Daniel Davenport, its Counsel, for a rule to the Judges of the Circuit Court of the United States for the District of Connecticut, to show cause to this Court why a writ of mandamus should not be issued, commanding and enjoining them to reinstate, take jurisdiction of and proceed to try and adjudge according to law and right of the case, the suit of Samuel A. Hermann vs. The Pennsylvania Company, as prayed for in said petition—

It is ordered by this Court that the said Judges show cause to this Court, on or before the day of 1890, why a writ of mandamus should not be issued, commanding and enjoining them to reinstate, take jurisdiction of and proceed to try and adjudge according to law and the right of the case said suit of Samuel A. Hermann vs. The Pennsylvania Company, as prayed for in said petition.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 6, ORIGINAL.

EX PARTE: IN THE MATTER OF THE PENNSYLVANIA COMPANY, PETITIONER.

RETURN TO RULE.

Supreme Court of the United States. October Term, 1890.

Ex Parte: In the Matter of THE PENNSYLVANIA COMPANY, Petitioner.

On petition for a writ of mandamus.

On consideration of the petition of the Pennsylvania Company—It is now here ordered by the court that cause be shown by the judges of the circuit court of the United States for the district of Connecticut, before this court, on Monday, the 24th day of November, 1890, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a writ of mandamus should not issue as prayed in said petition.

October 27th, 1890.

Circuit Court of the United States, District of Connecticut.

SAMUEL A. HERMAN
vs.
THE PENNSYLVANIA CO.

To the honorable the justices of the Supreme Court of the United States:

The return of the judges of the circuit court of the United States for the district of Connecticut to the foregoing rule to show cause why a mandamus should not issue.

The record, proceedings, and order whereof mention is therein made follow in these words and figures, viz:

United States Circuit Court, District of Connecticut.

SAMUEL A. HERMAN
vs.
THE PENNSYLVANIA CO.

Be it remembered that on the 22nd day of April, 1890, there was filed in court a transcript of record of a cause which was removed from the court of common pleas for Litchfield county and which is in the words and figures following, viz:

To the sheriff of the county of Hartford, his deputy, or either — the constables of the town of Hartford within said county, Greeting:

By authority of the State of Connecticut you are hereby commanded to attach to the value of seven hundred dollars the goods or estate of the Pennsylvania Company, a non-resident corporation, duly incorporated under the laws of the State of Pennsylvania and having an office and place of business in Pittsburgh, in the State of Pennsylvania, but having property in this State subject and liable to attachment, and it summon to appear before the court of common pleas to be holden at Canaan, within and for the county of Litchfield, on the first Monday of July, A. D. 1889, then and there to answer unto Samuel A. Herman, of the town of Winchester, in said Litchfield county, in a civil action wherein the plaintiff complains and says:

First count.

1. On and before June 4th, 1887, the plaintiff lent $500 to the defendant.

2. And paid, laid out, and expended said sum for the defendant.

3. And sold and delivered goods, wares, and merchandise of the price and value of said sum to the defendant.

4. And bargained and sold goods, wares, and merchandise of the price and value of said sum to the defendant.

5. And performed work and rendered professional services of the price and value of said sum for the defendant.

6. And furnished materials of the price and value of said sum to to the defendant.

7. And furnished board and lodging, washing, fuel, and other articles of the price and value of said sum to the defendant.

8. And furnished horses, harnesses, carriages, vehicles, and other property of the plaintiff to the defendant for its use for said sum.

9. And on said day the defendant had and received said sum to and for the use of the plaintiff.

10. And used and occupied certain lands, tenements, and apartments of the plaintiff by his permission, which use and occupation were reasonably worth said sum.

11. And said sum was found to be due to the plaintiff from the defendant on an account then and there stated between them.

12. Yet, though said sums are justly due to the plaintiff from the defendant, the defendant has never paid the same.

The plaintiff claims $500 damages.

Plaintiff is recognized in the sufficient sum of $100 to prosecute, etc.

Hereof fail not, but of this writ, with your doings thereon, make due return according to law.

Dated at Winchester, Conn., this 4 day of June, 1889.

ALBERTO T. RORABACK,
Justice of the Peace.

STATE OF CONNECTICUT, } ss:
Hartford County, }

HARTFORD, *June* 17, 1889.

Then and by virtue hereof I attached, as the property of the within-named defendant, two box cars of the Union Line Penn. Co., numbered 2847 and 7771, and took the same into my possession, and took a receipt for the same. And afterwards, on the 17th day of June, 1889, I left with —— Henney, as he is the agent of said company and defendant, a true and attested copy of the within writ, summons, and complaint, with my said doings thereon endorsed.

Attest:

A. P. MOORE.
Deputy Sheriff.

Fees:

Copies	75
Endorsement	24
Service	12
Travel	6 50
Securing property	1 00
Receipt	1 00
	$9 61

Court of Common Pleas, Litchfield County. July Term, 1889.

SAMUEL A. HERMAN }
vs.
PENNSYLVANIA CO. }

Amendment to Complaint.

1. The plaintiff, being an attorney-at-law, rendered services as such for the defendant, at the defendant's request, between May 1st, 1887, and March 1st, 1888, under an agreement between the parties that the plaintiff should charge reasonable fees therefor, including disbursements and expenses incidental thereto, and that the defendant would pay the plaintiff the amount due on the plaintiff's account in the premises on demand.

2. The amount due on the account charged, in conformity with said agreement, on March 1st, 1888, was, and still is, $481.25, and said account has been rendered to the defendant.

3. The defendant has not paid the same.

Court of Common Pleas. July Term, 1889.

SAMUEL A. HERMAN
vs.
PENNSYLVANIA CO.

Bill of Particulars.

1887.				
May	31.	To services to Litchfield		$
"	"	" expenses to "		2 50
June	4.	" services to "		
"	"	" expenses to "		2 50
"	7, 8, 9, 10.	" services to "		
"	" " "	" expenses to "		9 50
"	14 & 15.	" services to "		
"	"	" expenses to "		4 50
July	21.	" services to Canaan		
"	"	" expenses to "		1 80
Dec.	9.	" services to "		
"	"	" expenses to "		1 80
"	12.	" services to New Haven		
"	"	" expenses to " "		2 48
"	2.	" services to Canaan		
"	"	" expenses to "		1 80
"	28 & 29.	" services to Hartford		
"	"	" expenses to "		7 00
1888.				
Jan'y	3.	" services to "		
"	"	" expenses to "		2 75
"	6.	" cash paid for printing brief		13 00
"	10 & 11.	" services to Hartford		
"	"	" expenses to "		7 00
February	16.	" cash paid clerk of court for copies		2 75
		" services in preparation of case and brief, at various times and places		
				$547 75

CR.

By cash for costs received	66 50
Bal. due S. A. Herman Feb. 16, '88	481 25
Interest from	

Court of Common Pleas, July Term, 1889, Litchfield County.

S. A. HERMAN
vs.
PENNSYLVANIA COMPANY.

Defendant's Answer to Amended Complaint.

1. As to paragraph first of the plaintiff's complaint the defendant

admits the employment of the plaintiff, but of the other allegations therein the defendant has not sufficient knowledge to form a belief, and requires proof of the same by the plaintiff.

2. Paragraph second is denied.

3. Paragraph third is denied.

THE DEFENDANT,
By DAVENPORT & O'HARA, *His Att'ys.*

Court of Common Pleas, Litchfield County, State of Connecticut.
March Term, 1890.

SAMUEL A. HERMAN
vs.
THE PENNSYLVANIA COMPANY.

The petition of the Pennsylvania Company, defendant in the above-entitled action, respectfully represents to this honorable court that at the time of the commencement of said suit it was and still is a corporation duly organized under the laws of the State of Pennsylvania, and was and still is a citizen of the State of Pennsylvania, and that Samuel A. Herman, the plaintiff therein, was and still is a citizen of the State of Connecticut (that said suit is now pending for trial in this court and has not yet been tried) (amendment inserted by the court M'ch 15, 1890); that in said suit there is a controversy between the plaintiff, a citizen of the State of Connecticut, in which said suit is brought, and the defendant, a citizen of another State, to wit, the State of Pennsylvania; that from prejudice and local influence said defendant will not be able to obtain justice in this court of common pleas for Litchfield county or in any other State court to which the said defendant, under the laws of the State of Connecticut, has the right, on account of such prejudice and local influence, to remove said suit; that it files herewith an affidavit of Joseph Wood, of Pittsburgh, Pennsylvania, its general manager, the proper officer of the defendant, said Pennsylvania Company, that from prejudice and local influence said defendant, The Pennsylvania Company, will not be able to obtain justice in this court of common pleas of Litchfield county or in any other State court to which it has, under the laws of the State of Connecticut, a right, on account of such prejudice and local influence, to remove said cause, and that he has reason to believe and does believe that from prejudice and local influence said defendant, The Pennsylvania Company, will not be able to obtain justice in the court of common pleas for Litchfield county or in any other State court to which it has, under the laws of the State of Connecticut, a right, on account of such prejudice or local influence, to remove said cause.

Your petitioner makes and files herewith a bond, with good and sufficient surety, for his entering in the circuit court of the United States for the district of Connecticut, on the first day of its next session, a copy of the record and of the process against it, and of all pleadings, depositions, testimony, and other proceedings in said cause, and for paying all costs that may be awarded by said circuit

court if said circuit court shall hold that this suit has been wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to accept this petition and said bond and order the transfer of said suit to said circuit court of the United States for the district of Connecticut.

THE PENNSYLVANIA COMPANY,
By JOSEPH WOOD, *General Manager, and*
DAVENPORT & O'HARA,
Its Attorneys.

In the Court of Common Pleas for Litchfield County, State of Connecticut.

SAMUEL A. HERMAN
vs.
THE PENNSYLVANIA COMPANY.

I, Joseph Wood, of Pittsburgh, in the State of Pennsylvania, being duly sworn, do depose and say that I am the general manager of The Pennsylvania Company, defendant in the above-entitled action, that from prejudice and local influence said defendant will not be able to obtain justice in this court of common pleas for Litchfield county or in any other State court to which the said defendant, under the laws of the State of Connecticut, has the right, on account of such prejudice and local influence, to remove said cause, and that I have reason to believe and do believe that from prejudice and local influence said defendant, The Pennsylvania Company, will not be able to obtain justice in said court of common please for Litchfield county or in any other State court to which it has under the laws of the State of Connecticut a right, on account of such prejudice and local influence, to remove said cause, and that I am duly authorized by said defendant, The Pennsylvania Company, to make this affidavit.

JOSEPH WOOD.

Subscribed by the said Joseph Wood in my presence and by him sworn to before me this fifth day of March, 1890.

[SEAL.] WILLIAM F. ROBB,
Commissioner for the State of Connecticut in Pittsburgh, Penns.

Know all men by these presents that The Pennsylvania Company, a corporation duly organized under the laws of the State of Pennsylvania, as principal, and Smith P. Glover, of Newton, county of Fairfield, and State of Connecticut, as surety, are held and firmly bound unto Samuel A. Herman, of Winchester, county of Litchfield, and State of Connecticut, in the penal sum of 500 dollars; for the payment whereof, well and truly to be made unto the said Samuel A. Herman, his heirs, representatives, assigns, we bind ourselves, our heirs, representatives, assigns, and successors, jointly and severally, firmly by these presents—

Yet upon these conditions: The said Pennsylvania Company hav-

ing petitioned the court of common pleas for Litchfield county, State of Connecticut, for the removal of a certain cause therein pending, wherein Samuel A. Herman is plaintiff and The Pennsylvania Company is defendant, to the circuit court of the United States in and for the district of Connecticut:

Now, if the said Pennsylvania Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record, process, pleadings, depositions, testimony, and other proceedings in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this fifth day of March, 1890.

[SEAL.] THE PENNSYLVANIA COMPANY,
By J. W. McCULLUGH, *Vice-President.*
SMITH P. GLOVER. [L. S.]

Attest:
S. B. LIGGETT, *Secretary.*
R. P. BELDEN,
Witness to Smith P. Glover's signature.

FAIRFIELD COUNTY, *ss:*

BRIDGEPORT, *March* 8, 1890.

Personally appeared Smith P. Glover, of Newtown, Connecticut, surety in the above bond, and made oath that he is the owner in fee simple of real estate situated in said town of Newtown which is worth more than $5,000, and that the same is free from all incumbrances whatsoever. Before me—

WM. H. O'HARA,
Commissioner of the Superior Court for Fairfield County.

Filed March 10th, 1890.

Court of Common Pleas, Litchfield County, State of Connecticut.
March Term, 1890.

SAMUEL A. HERMAN
vs.
THE PENNSYLVANIA COMPANY.

Objection and remonstrance by the plaintiff to the removal of the above-entitled cause to the circuit court of the United States.

The plaintiff hereby objects to and remonstrates against the removal of the above-entitled cause and action to the circuit court of the United States for the district of Connecticut for the following reasons, namely:

1. Because said circuit court has no jurisdiction of said cause or action, neither can it acquire any jurisdiction by the defendant's proceedings for removal.

2. Because it does not appear from any evidence offered in court that there is any *legal* prejudice or influence which will prevent the defendant from obtaining justice in the State court or courts.

3. Because there is no prejudice or local influence to prevent or obstruct the defendant from obtaining justice in said State court of common pleas of Litchfield county, Connecticut, or in any other State court in said Connecticut to which the said defendant may under the laws of the State of Connecticut have the right to remove said cause.

4. Because it does not appear from the record in said cause that the subject-matter involved or in dispute is over five hundred dollars in amount and not within the jurisdiction of the said circuit court of the United States.

5. Because it does not appear from the record in said cause that the subject-matter involved and in dispute, exclusive of interest and costs, does not exceed the sum or value of five hundred dollars.

6. Because the petition and proceedings for said removal do not state or set forth whether said suit or cause has or has not been tried.

7. Because the said petition and proceedings for said removal does not state or allege the purpose or nature of said suit or cause sought to be removed or the relief asked or prayed for therein.

8. Because said proceedings for removal are subsequent to the filing of the answer and pleadings by the defendant to the declaration and complaint of the plaintiff, and subsequent to the time when the defendant is required by the laws of the State of Connecticut and the rules of said court of common pleas to plead and answer to the declaration and complaint of the plaintiff, and subsequent to the trial of said cause.

9. Because it does not appear from the pretended affidavit upon what grounds the affiant bases his belief or whether he is or has been in a position to judge or know whether any prejudice or local influence exists to prevent the defendant from being able to obtain justice in said court of common pleas or in some Connecticut State court, which by the laws of Connecticut the defendant has a right to remove said cause.

10. Because there is no affidavit by the defendant that the defendant believes that from prejudice or local influence the defendant will not be able to obtain justice in the court of common pleas for Litchfield county, Connecticut, or in any other Connecticut State court to which said defendant may under the laws of said State of Connecticut have the right to remove the same.

11. Because it does not appear that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

SAMUEL A. HERMAN, *per se.*

Filed M'ch 14, 1890.

Court of Common Pleas, Litchfield County, State of Connecticut.

SAMUEL A. HERMAN
vs.
THE PENNSYLVANIA COMPANY.

Order for removal of said case to the circuit court of the United States for the district of Connecticut, in the second circuit.

Upon reading and filing the petition of the above-named Pennsylvania Company, defendant herein, for the removal of the suit into the circuit court of the United States for the district of Connecticut, in the second district, in pursuance of the laws of the United States relating to the removal of suits from the State courts on the ground of prejudice and local influence, before the trial thereof in this court, and upon filing the affidavit of Joseph Wood, the proper officer of the defendant corporation, that on account of such prejudice and local influence the defendant will not be able to obtain justice in said State court or in any other State court to which it has the right, under the laws of the State of Connecticut, on account of such prejudice and local influence, to remove said suit, and that he believes that from prejudice and local influence the defendant will not be able to obtain justice in said State court nor in any other State court to which it has the right under the laws of the State of Connecticut, on account of such prejudice and local influence, to remove said suit, and upon filing the security offered by said defendant according to the requirements of the laws of the United States, and on motion of Davenport and O'Hara, the attorneys for said defendant, it is hereby ordered that the said security be accepted and the said suit be removed into the next circuit court of the United States to be held in said district of Connecticut, and that no further proceedings be had in said suit in this court.

Witness the Honorable Albert P. Bradstreet, judge of the district court of Waterbury, — acting judge of the court of common pleas for Litchfield county, and the seal thereof, this 15th day of March, 1890.

By the court:

[SEAL.] WM. F. HURLBUT, *Clerk.*

Court of Common Pleas, Litchfield County.

STATE OF CONNECTICUT, } *ss:*
County of Litchfield, }

I, Wm. F. Hurlbut, clerk of the court of common pleas for the county of Litchfield aforesaid, do certify that the within and foregoing is a true copy of the original complaint, pleadings, motion of the defendant for the removal to the circuit court of the United States for the district of Connecticut, remonstrance of plaintiff thereto, and order of court thereon in the case of Samuel A. Herman *vs.* The Pennsylvania Company as on file and record in the clerk's office of said court of common pleas.

In witness whereof I hereunto set my hand officially and affix the seal of said court of common pleas, at Winchester, in the county and State aforesaid, this 17th day of March, 1890.

[SEAL.] WM. F. HURLBUT, *Clerk.*

And on the same day petition for removal was filed in the words and figures following, viz:

SAMUEL A. HERMAN
vs.
THE PENNSYLVANIA COMPANY.

To the honorable the circuit court of the United States for the district of Connecticut, in the second circuit:

The petition of the Pennsylvania Company, a corporation duly organized under the laws of the State of Pennsylvania and a citizen of said State of Pennsylvania, respectfully shows that Samuel A. Herman, of the town of Winchester, county of Litchfield, and State of Connecticut, a citizen of said State of Connecticut, brought an action as sole plaintiff against your petitioner, the said The Pennsylvania Company, as sole defendant, in the court of common pleas for Litchfield county, in the State of Connecticut, a State court of said State of Connecticut, at its term commencing on the first Monday in July, 1889; that at the time of the commencement of said suit the said Samuel A. Herman, plaintiff therein, was and still is a citizen of the State of Connecticut, and the said The Pennsylvania Company was and still is a citizen of the State of Pennsylvania; that in said suit there is a controversy between a citizen of the State of Connecticut, in which said suit is brought, and a citizen of another State, to wit, the State of Pennsylvania; that from prejudice against the defendant and from the local influence of the said plaintiff your petitioner, said The Pennsylvania Company, will not be able to obtain justice in said court of common pleas for Litchfield county, in the State of Connecticut, nor in any other State court to which, under the laws of the State of Connecticut, the defendant has the right, on account of such prejudice and local influence, to remove said cause; that said cause has not yet been tried in said court of common pleas for Litchfield county, in the State of Connecticut, and that said suit is still pending in said cou t for trial unless it has been removed to this court by virtue of the proceedings heretofore had in said State court, hereinafter set forth; that your petitioner desires to remove said cause, before the trial thereof, into the circuit court of the United States for the district of Connecticut, in the second circuit, in pursuance of the provisions of law as contained in the act of Congress approved August 13, 1888, being chapter 886 of the acts of the 50th Congress of the United States, and of the other acts of Congress of which said act is amendatory; that on March 18th, 1890, while said suit was still pending in the said court of common pleas for Litchfield county, in the State of Connecticut, and before the trial thereof, your petitioner, the said The Pennsylvania

Company, filed in said court its petition for the removal of said cause from said court of common pleas to the circuit court of the United States for the district of Connecticut; which petition was as follows:

Court of Common Pleas, Litchfield County, State of Connecticut.
March Term, 1890.

SAMUEL A. HERMAN
vs.
THE PENNSYLVANIA COMPANY.

The petition of The Pennsylvania Company, defendant in the above-entitled action, respectfully represents to this honorable court that at the time of the commencement of said suit it was and still is a corporation duly organized under the laws of the State of Pennsylvania, and was and still is a citizen of the State of Pennsylvania, and that Samuel A. Herman, the plaintiff therein, was and still is a citizen of the State of Connecticut; that said suit is now pending for trial in this court and has not yet been tried; that in said suit there is a controversy between the plaintiff, a citizen of the State of Connecticut, in which said suit is brought, and the defendant a citizen of another State, to wit, the State of Pennsylvania; that from prejudice and local influence said defendant will not be able to obtain justice in this court of common pleas for Litchfield county or in any other State court to which the said defendant, under the laws of the State of Connecticut, has the right, on account of such prejudice and local influence, to remove said suit; that it files herewith an affidavit of Joseph Wood, of Pittsburgh, Pennsylvania, its general manager, the proper officer of the defendant, said Pennsylvania Company, that from prejudice and local influence the defendant, The Pennsylvania Company, will not be able to obtain justice in this court of common pleas of Litchfield county or in any other State court to which it has under the laws of the State of Connecticut a right, on account of such prejudice and local influence, to remove said cause, and that he has reason to believe and does believe that from prejudice and local influence said defendant, The Pennsylvania Company, will not be able to obtain justice in the court of common pleas for Litchfield county or in any other State court to which it has under the laws of the State of Connecticut a right, on account of such prejudice or local influence, to remove said cause. Your petitioner makes and files herewith a bond, with good and sufficient surety, for his entering in the circuit court of the United States for the district of Connecticut, on the first day of its next session, a copy of the record and of the process against it, and of all pleadings, depositions, testimony, and other proceedings in said cause, and for paying all costs that may be awarded by said circuit court if said circuit court shall hold that this suit has been wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to accept this

petition and said bond and order the transfer of said suit to said circuit court of the United States for the district of Connecticut.

THE PENNSYLVANIA COMPANY,
By JOSEPH WOOD, *General Manager, and*
DAVENPORT & O'HARA,
Its Attorneys.

That on said day, at the time of filing said petition, your petitioner filed in said court of common pleas the affidavit of Joseph Wood, the general manager of your petitioner, its proper officer, thereunto duly authorized, that on account of such prejudice and local influence The Pennsylvania Company, your petitioner, the defendant in said suit, would not be able to obtain justice in the said court of common pleas for Litchfield county nor in any other State court to which the defendant, under the laws of the State of Connecticut, has the right, on account of such prejudice and local influence, to remove said cause, and that he had reason to believe and did believe that the defendant, your petitioner, would not be able to obtain justice in said State courts on account of such prejudice and local influence; which affidavit was as follows:

In the Court of Common Pleas for Litchfield County, State of Connecticut.

SAMUEL A. HERMAN
vs.
THE PENNSYLVANIA COMPANY.

I, Joseph Wood, of Pittsburgh, in the State of Pennsylvania, being duly sworn, do depose and say that I am the general manager of The Pennsylvania Company, defendant in the above-entitled action; that from prejudice and local influence said defendant will not be able to obtain justice in this court of common pleas for Litchfield county or in any other State court to which the said defendant, under the laws of the State of Connecticut, has the right, on account of such prejudice and local influence, to remove said cause, and that I have reason to believe and do believe that from prejudice and local influence said defendant, The Pennsylvania Company, will not be able to obtain justice in said court of common pleas for Litchfield county or in any other State court to which it has, under the laws of the State of Connecticut, a right, on account of such prejudice and local influence, to remove said cause, and that I am duly authorized by said defendant, The Pennsylvania Company, to make this affidavit.

JOSEPH WOOD.

Subscribed by the said Joseph Wood in my presence and by him sworn to before me this fifth day of March, 1890.

WILLIAM F. ROBB,
[SEAL.] *Commissioner for the State of Connecticut in Pittsburgh, Penn.*

That at the time of filing said petition in said court of common pleas for Litchfield county your petitioner offered a bond in said court, with good and sufficient surety for its entering in said circuit court of the United States for the district of Connecticut, on the first day of its next session, a copy of the record, process, pleadings, depositions, testimony, and other proceedings in said suit; which bond was as follows:

"Know all men by these presents that the Pennsylvania Company, a corporation duly organized under the laws of the State of Pennsylvania, as principal, and Smith P. Glover, of Newtown, county of Fairfield, and State of Connecticut, as surety, are held and firmly bound unto Samuel A. Herman, of Winchester, county of Litchfield, and State of Connecticut, in the penal sum of $500 *dollars*; for the payment whereof, well and truly to be made unto the said Samuel A. Herman, his heirs, respresentatives, and assigns, we bind ourselves, our heirs, representatives, assigns, and successors, jointly and severally, firmly by these presents—

Yet upon these conditions The said Pennsylvania Company having petioned the court of common pleas for Litchfield county, State of Connecticut, for removal of a certain cause therein pending, wherein Samuel A. Herman is plaintiff and The Pennsylvania Company is defendant, to the circuit court of the United States in and for the district of Connecticut:

Now, if the said Pennsylvania Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record, process, pleadings, depositions, testimony, and other proceedings in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this fifth day of March, 1890.

THE PENNSYLVANIA COMPANY,
By J. W. McCULLUGH, *Vice-President.*
SMITH P. GLOVER. [L. S.]

Attest:
S. B. LIGGETT, *Secretary.*
R. B. BELDEN,
Witness to Smith P. Glover's signature.

FAIRFIELD COUNTY, *ss:*

BRIDGEPORT, *March* 8, 1890.

Personally appeared Smith P. Glover, of Newtown, Connecticut, surety in the above bond, and made oath that he is the owner in fee simple of real estate situated in said town of Newtown which is worth more than $5,000, and that the same is free from all incumbrances whatsoever.

Before me—

WM. H. O'HARA,
Commissioner of the Superior Court for Fairfield County."

That on the 15th day of March, 1890, the said court of common pleas for Litchfield county, in the State of Connecticut, after hearing and after due notice to the plaintiff, had approved said bond and surety and ordered said cause transferred to the United States circuit court for the district of Connecticut, and that no further proceedings be had in said court of common pleas for Litchfield county, in the State of Connecticut; which order was as follows:

Court of Common Pleas, Litchfield County, State of Connecticut.

SAMUEL A. HERMAN
vs.
THE PENNSYLVANIA COMPANY.

Order of removal of said case to the circuit court of the United States for the district of Connecticut, in the second circuit.

Upon reading and filing the petition of the above-named Pennsylvania Company, defendant herein, for the removal of the suit unto the circuit court of the United States for the district of Connecticut, in the second district, in pursuance of the laws of the United States relating to the removal of suits from the State courts on the ground of prejudice and local influence, before the trial thereof, in this court, and upon filing the affidavit of Joseph Wood, the proper officer of the defendant corporation, that on account of such prejudice and local influence the defendant will not be able to obtain justice in said State court or in any other State court to which it has the right, under the laws of the State of Connecticut, on account of such prejudice and local influence, to remove said suit, and that he believes that from such prejudice and local influence the defendant will not be able to obtain justice in said State court nor in any other State court to which it has the right under the laws of the State of Connecticut, on account of such prejudice and local influence, to remove said suit, and upon filing the security offered by said defendant according to the requirements of the laws of the United States, and, on motion of Davenport and O'Hara, the attorneys for said defendant, it is hereby ordered that the said security be accepted and the said suit be removed into the next circuit court of the United States to be held in said district of Connecticut, and that no further proceedings be had in said suit in this court.

Witness the Honorable Albert P. Bradstreet, judge of the district court of Waterbury, acting judge of the court of common pleas for Litchfield county, and the seal thereof, this 15th day of March, 1890.

By the court:

[SEAL.] W. F. HURLBUT, *Clerk.*

That your petitioner has filed in this court on this the first day of its next session after said petition was presented to said court of common pleas a copy of the record of said cause and of the process, pleadings, depositions, testimony, and other proceedings in said suit in said court of common pleas for Litchfield county, Connecticut.

Wherefore your petitioner prays that the said suit may be removed into the circuit court of the United States for the district of Connecticut, in the second circuit, and that this court will take jurisdiction of said cause.

The Pennsylvania Company, your petitioner, files herewith the affidavit of Joseph Wood, of Pittsburgh, county of Allegheny, and State of Pennsylvania, its general manager, in support of the averment of prejudice and local influence contained in the foregoing petition.

Dated at Bridgeport, Connecticut, this 21st day of April, A. D. 1890.

THE PENNSYLVANIA COMPANY,
By DAVENPORT & O'HARA, *Its Attorneys.*

In the Circuit Court of the United States for the District of Connecticut.

SAMUEL A. HERMAN
vs.
THE PENNSYLVANIA COMPANY.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, Joseph Wood, of Pittsburgh, in the county of Allegheny and State of Pennsylvania, being duly sworn, do depose and say that I am the general manager of The Pennsylvania Company, defendant in the above-entitled cause; that the plaintiff in said cause resides in the town of Winchester, in the county of Litchfield and State of Connecticut; that he is now and has been for a number of years an attorney-at-law, with an office in said town of Winchester; that he has an extensive and influential acquaintance in said county and throughout said State of Connecticut; that Alberto T. Roraback, the judge of the court of common pleas for Litchfield county, in which court the above-entitled cause is pending for trial, before he qualified as such judge, signed the writ and complaint in said cause, and on the docket of said court entered as attorney for said Herman, plaintiff in said cause; that by reason of the said Roraback having acted as the attorney for said Herman he should be disqualified to act as a judge to try said cause; that as the acting judge of said court he has the power and it is his duty to designate another judge to try said cause, and the defendant is without any power whatsoever in the premises; that said cause is on the jury docket of said court for trial; that the jurors for said court must be electors and inhabitants of said county of Litchfield; that many of said jurors now have, and in the future may have, causes pending in said court of common pleas for Litchfield county before the said Roraback, as judge of said court, for trial; that many of said jurors have been, and some of them still are, clients, personal friends, companions, and relatives of both the said Herman and the said Roraback; that the said Roraback, as judge of said court, and the clerk of said

court have the opportunity in the selection of a jury for the trial of said cause to designate from what town or towns in said county of Litchfield the necessary jurors shall be drawn and summoned.

That the defendant in the above-entitled cause is a railroad corporation, and as such was a defendant in a certain action entitled Harry E. Palmer and Wife ag't The Chicago, Burlington & Quincy Railroad and The Pennsylvania Company, which action was tried in the superior court in the county of Litchfield and afterwards in the supreme court of errors of said State of Connecticut; that during the trial of said Palmer case in both of said courts the local press of said county—that is to say, the Litchfield Enquirer, a weekly paper published at Litchfield, and having a large circulation throughout said county, and other papers—commented at large upon said Palmer case and adversely to the interests of the Pennsylvania Company; that the said Samuel A. Herman has great local influence in said court of common pleas, in which the above-entitled action is pending; that there is prejudice existing against the said Pennsylvania Company, the defendant in said cause, in said court of common pleas in said county and State; that from such prejudice existing against the said defendant and from the local influence of the said plaintiff said defendant will not be able to obtain justice in said court of common pleas for Litchfield county or in any other State court to which the said defendant has the right, on account of such prejudice against the defendant and on account of the local influence of the plaintiff, to remove said cause; and that I am duly authorized by said defendant, The Pennsylvania Company, to make this affidavit.

JOSEPH WOOD.

Subscribed by the said Joseph Wood in my presence and by him affirmed to before me on this 16th day of April, A. D. 1890, at Pittsburgh, Pennsylvania.

[SEAL.] S. C. McCANDLESS,
U. S. Commissioner, Western District of Penna.

And on the same day motion to remand to court of common pleas was filed in the words and figures following, viz:

Circuit Court of the United States, District of Connecticut. April Term, 1890.

SAMUEL A. HERMAN
vs.
THE PENNSYLVANIA COMPANY.

Motion to Remand to State Court.

The plaintiff in the above-entitled cause moves the court to remand the same to the State court from which it was removed, to wit, to the court of common pleas for Litchfield county, in the State of Connecticut, for the following reasons:

First. It appears from the record in the cause that the matter in

dispute does not exceed, exclusive of costs, the sum or value of two thousand dollars, but is only equal to the sum or value of five hundred dollars, and that the cause is not within the jurisdiction of this court.

Second. Because the petition for removal was not in the State court filed before the time in which the defendant is by the laws of the State of Connecticut required to answer or plead, nor was the same filed in said court before the trial of the cause, but said petition was filed after the time limited for answer and plea as aforesaid and after the trial of the cause in the State court.

Third. Because neither from the record in the cause nor from any facts alleged in the affidavit attached to the petition for removal nor in any other manner has it been made to appear nor does it appear to this court that the defendant, on account of prejudice or local influence, will not be able to obtain justice in the court of common pleas for Litchfield county, Connecticut, or in any other State court to which the cause is by the laws of that State removeable, and the plaintiff denies the existence of such prejudice or local influence, and denies that the defendant cannot in the State court as aforesaid obtain justice in the cause.

PLAINTIFF,
By LEWIS E. STANTON, *Attorney.*

And at the term of said court held at New Haven, on the fourth Tuesday of April, 1890, to wit, on the 22nd day of April, the parties, with their respective counsel, duly appeared, and said cause was fully heard, and on the 16th day of May, 1890, opinion of court was filed in the words and figures following, viz:

United States Circuit Court, District of Connecticut.

RORABACK
vs.
THE PENNSYLVANIA COMPANY.

HERMAN
vs.
THE PENNSYLVANIA COMPANY.

WALLACE, *J.:*

The question in these cases is whether under the local-prejudice clause of the act of March 3, 1887, the matter in dispute must exceed in amount the sum of $2,000 to entitle the defendant to remove the suit from a State court. This question has been considered in several of the circuits with a diversity of opinion as to the true construction of the clause. My own views accord with those expressed by Mr. Justice Harlan in Malone *v.* Richmond & D. R. R. Co. (35 Fed. Rep. 625), and it is unnecessary to reiterate his reasons for the conclusion reached.

I think it was the intention of Congress to place the right of removal for local prejudice upon the jurisdictional basis of all other removeable controversies, discriminating in favor of the defendant

only as to the time of making the application and permitting a single defendant to remove.

The motion to remand is granted.

L. E. STANTON, *For Plaintiffs.*
DAVENPORT & O'HARA, *For Def't.*

And on the 20th day of May, 1890, order to remand to court of common pleas for Litchfield county was made and filed in the words and figures following, viz:

Circuit Court of the United States, District of Connecticut. April Term, 1890.

SAMUEL A. HERMAN
vs.
THE PENNSYLVANIA COMPANY.

Order to Remand to State Court.

This cause came on to be tried before the court in chambers, at Hartford, in said district; and thereupon it appears that an opinion of Hon. W. J. Wallace, circuit judge, has been filed in the cause granting the motion to remand which has been filed by the plaintiff.

Therefore it is now ordered by the court that said cause be remanded to the State court from which the same was removed, to wit, to the court of common pleas for Litchfield county and State of Connecticut, with costs to the plaintiff, to be taxed.

Dated at Hartford, Conn., this 20th day of May, 1890.

N. SHIPMAN,
District Judge.

UNITED STATES OF AMERICA, *District of Connecticut,* } *ss:*

I, Edwin E. Marvin, clerk of the circuit court of the United States for the district of Connecticut, do certify that the annexed paper is a true copy of the original proceedings and order, whereof mention is therein made, in the matter of Samuel A. Herman *vs.* The Pennsylvania Company, No. 368, law, on file in said court.

In testimony whereof I have set hereunto my name officially and the seal of said court, at Hartford, in said district, this 11th day of November, A. D. 1890.

[SEAL.]

E. E. MARVIN, *Clerk.*

And for further return to said rule to show cause these respondents show as follows:

That said petition addressed to the circuit court by the defendant, The Pennsylvania Company, alleging that from prejudice and local influence the defendant will not be able to obtain justice in the State court to which the suit was brought or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove

said cause, was filed in the circuit court on the first day of its term, held at New Haven on the fourth Tuesday of April, 1890, and, as these respondents are informed, was never served upon the plaintiff therein; that no hearing has been had upon the allegations of said petition, nor has it been made in any manner to appear to the circuit court that the defendant will not, for the reasons aforesaid, be able to obtain justice in the State court except by the affidavit of Joseph Wood, the general manager of the defendant corporation, which appears in the record attached to the petition for the removal of the cause.

And these respondents further say that the question whether the cause should be remanded to the State court was tried in the circuit court only upon the motion to remand which was filed in the cause by the plaintiff therein), and no hearing was had upon the foregoing petition or inquiry made as to the truth of the same, because the matter in dispute in said suit does not exceed the sum or value of two thousand dollars and is not more than five hundred dollars; and thereupon the judges of the circuit court were and are of the opinion that under the act of Congress of March 3d, 1887, as amended by the act of August 13th, 1888, a cause is not removable from a State court to this court unless the matter in dispute exceeds, exclusive of interests and costs, the sum or value of two thousand dollars, although the removal be sought under the local-prejudice clause of the act, for the reasons set forth by the circuit judge and which appear in the record aforesaid.

And these respondents further say that they have set forth the record in the cause, and also the above facts, which are hereby made part of this return, and are found to be the facts in the cause, and they respectfully say that a mandamus ought not to issue requiring them to reinstate, take jurisdiction of, or proceed to try or adjudge the said suit.

Dated at Hartford, in the State and district of Connecticut, this 10th day of November, 1890.

All which is respectfully submitted.

WILLIAM J. WALLACE,
Circuit Judge.
N. SHIPMAN, *District Judge.*

(Endorsed:) Supreme Court U. S. 1890, October term. No. 6, Original. *Ex parte:* In the matter of the Pennsylvania Company petitioner. Return to rule to show cause. Filed Nov'r 14, 1890.

Office Supreme Court U. S.
FILED.
DEC 3 1890
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States,

October Term, 1890.

EX PARTE

IN RE

THE PENNSYLVANIA COMPANY,

PETITIONER.

TWO CASES.

BRIEF FOR PETITIONER.

DANIEL DAVENPORT,
WILLIAM H. O'HARA,
Counsel for Petitioner.

J. H. COGGSWELL, PRINTER, STATE STREET, BRIDGEPORT.

Supreme Court of the United States,

October Term, 1890.

EX PARTE

IN RE

THE PENNSYLVANIA COMPANY,

PETITIONER.

TWO CASES.

ARGUMENT FOR PETITIONER.

These are petitions to this Court for writs of mandamus to compel the Circuit Court of the United States for the District of Connecticut to reinstate, take jurisdiction of, and proceed to try and adjudge according to the law and right of the cause, the cases of Alberto T. Roraback against The Pennsylvania Company, and of Samuel A. Hermann against The Pennsylvania Company, which have been removed to said Circuit Court from the Court of Common Pleas for Litchfield County, in the State of Connecticut, and have been ordered by said Circuit Court to be remanded to the State Court on the ground that the matter in dispute in each does not exceed $2000 in amount.

The cases had been removed under the fourth clause of the second section of the Act of Congress of March 3d, 1887, as corrected by the Act of August 13, 1888, better known as the "Local Prejudice Clause."

In each of these cases, the petition to this Court, and the return of the learned Judges to the rule issued thereon, present the following state of facts:

A suit was brought in the Court of Common Pleas for Litchfield County, in the State of Connecticut, a State Court of said State, on the 1st Monday of July, 1889, by a citizen of said State against your petitioner, who was a citizen of the State of Pennsylvania, non-resident in the State of Connecticut. Your petitioner, defendant, as aforesaid, appeared in said Court and answered to the suit. There was a controversy in said suit between a citizen of said State of Connecticut, to-wit., the plaintiff, and a citizen of another State, to-wit., your petitioner. The value of the matter in dispute in said suit was $500, exclusive of interest and costs.

Before the trial of said suit, the citizenship of the parties remaining unchanged, your petitioner made and filed in said Court, a petition in said suit, addressed to said Court for the removal of said suit to the United States Circuit Court for the District of Connecticut, and alleged in said petition, as the ground of such removal, that from prejudice against your petitioner, the defendant in said suit, and from the local influence of the plaintiff therein, your petitioner would not be able to obtain justice in said State Court, or in any other State Court to which the defendant had the right, under the laws of the State of Connecticut, on account of such prejudice and local influence to remove said cause, and made and filed therewith an affidavit of the proper officer of your petitioner, showing the existence of such prejudice and local influence, and that on account of them, your petitioner would not be able to obtain justice in said State Court, nor in any other State Court to which your petitioner had the right under the laws of said State of Connecticut, on account of such prejudice and local influence to remove said cause; further showing that such affiant had reason to believe, and did believe, that from prejudice against your petitioner, and from the local influence of the plaintiff in said suit, your petitioner would not be able to ob-

tain justice in said State Court, or in any other State Court to which your petitioner had the right under the laws of the State of Connecticut, on account of such prejudice and local influence to remove said suit.

And your petitioner also made and filed therewith, a bond with good and sufficient surety, for its entering in said Circuit Court, on the first day of its next session, a copy of the record, process, pleadings, depositions, testimony and other proceedings in said suit, and for paying all costs that might be awarded by said Circuit Court if said Court should hold that said suit was improperly removed.

The plaintiff in said suit objected to its removal, and, after hearing had, on the 15th day of March, 1890, said State Court accepted said petition and bond, and granted the prayer of said petition, and ordered that said suit be removed to the said Circuit Court of the United States for the District of Connecticut, and that no further proceedings be had in said State Court.

Afterwards, at the opening of said Circuit Court, on the first day of its next session, being the fourth Tuesday of April, your petitioner entered in said Circuit Court a full copy of the record in said suit, and on the same day your petitioner filed in said Circuit Court, a petition addressed to it, reciting the various steps above mentioned, taken by your petitioner, to secure the removal of said cause from said State Court to said Circuit Court, and further alleging, that from prejudice against your petitioner and the local influence of the plaintiff in said suit, your petitioner would not be able to obtain justice in said State Court, nor in any other State Court to which your petitioner, defendant, as aforesaid, might under the laws of the State of Connecticut, have the right, on account of such prejudice and local influence to remove said cause, and further praying said Circuit Court to take jurisdiction of said suit, and to remove the same from said State Court, if the same had not already been removed into said Circuit Court from said State Court, by the before mentioned steps already taken by your

petitioner, and by the action of said State Court in ordering said removal, and staying all further proceedings in said State Court in said suit; and at the same time with the filing of said petition to the Circuit Court, your petitioner filed in said Circuit Court, an affidavit of Joseph Wood, the general manager and proper officer of your petitioner, setting forth all the facts which proved the existence of such prejudice and local influence in said State Court, and that on account of such prejudice and local influence, the defendant, your petitioner, would not be able to obtain justice in said State Court, or in any other State Court to which it had the right under the laws of the State of Connecticut, on account of such prejudice and local influence to remove said suit.

Your petitioner made it to appear to said Circuit Court that from prejudice and local influence it would not be able to obtain justice in said suit in said Court of Common Pleas for Litchfield County, in the State of Connecticut, or in any other State Court to which it had the right, under the laws of the State of Connecticut, on account of such prejudice and local influence to remove said suit, and said suit was duly entered upon the docket of said Circuit Court.

The plaintiff in said suit then filed in said Circuit Court the following motion to remand the case to the State Court:

"The plaintiff in the above entitled cause moves the Court to remand the same to the State Court from which it was removed, to wit: the Court of Common Pleas for Litchfield County, in the State of Connecticut, for the following reasons:

First. It appears from the record in the cause that the matter in dispute does not exceed, exclusive of costs, the sum or value of two hundred dollars, and that the cause is not within the jurisdiction of the Court.

Second. Because the petition for removal was not in the State Court filed before the time in which the defendant is by the laws of the State of Connecticut required to answer or

plead, nor was the same filed in said Court before the trial of the cause, but said petition was filed after the time limited for answer and plea as aforesaid and after the trial of the cause in the State Court.

Third. Because neither from the record, nor from any facts alleged in the affidavit attached to the petition for removal, nor in any other manner, has it been made to appear, nor does it appear, to this Court, that the defendant, on account of such prejudice or local influence, will not be able to obtain justice in the Court of Common Pleas for Litchfield County, Connecticut, or in any other State Court to which the cause is by the laws of the State removable; and the plaintiff denies the existence of such prejudice or local influence, and denies that the defendant cannot, in the State Court as aforesaid, obtain justice in the cause."

At the term of the Court held at New Haven, on the 4th Tuesday of April, 1890, to wit: on the 22d day of April, 1890, the parties with their respective counsel duly appeared, and said motion to remand was fully heard; and on the 16th day of May, 1890, the opinion of the Court thereon by his Honor Judge Wallace, was filed as follows:

"The question in these cases is whether under the local prejudice clause of the Act of March 3, 1887, the matter in dispute must exceed in amount the sum of $2000, to entitle the defendant to remove the suit from a State Court. This question has been considered in several of the Circuits, with a diversity of opinion as to the true construction of the clause. My own views accord with those expressed by Mr. Justice Harlan in *Malone vs. Richmond & D. R. R. Co. 35 Fed. Rep. 625*, and it is unnecessary to reiterate his reasons for the conclusion reached. I think it was the intention of Congress to place the right of removal for local prejudice upon the jurisdictional basis of all other removable controversies, discriminating in favor of the defendant only as to the time of making the application and permitting a single defendant to remove.

The motion to remand is granted."

On the 20th day of May, 1890, the following order was made in the case:

"This cause came on to be tried before the Court in chambers at Hartford, in said District; and thereupon it appears that an opinion of Hon. W. J. Wallace, Circuit Judge, has been filed in the cause, granting the motion to remand, which has been filed by the plaintiff;

Therefore, it is now ordered by the Court that said cause be remanded to the State Court from which the same was removal, to wit: the Court of Common Pleas for Litchfield County and State of Connecticut, with costs to the plaintiff to be taxed.

Dated at Hartford, this 20th day of May, 1890.

N. SHIPMAN, Dist. Judge."

The petition addressed to the Circuit Court was never served upon the plaintiff in the suit. It appeared to the Circuit Court by the aforesaid affidavit that such prejudice and local influence existed, and the Circuit Court has had no hearing upon the allegations in said petition, because it considered that the cause was not within its jurisdiction, because the matter in dispute therein does not exceed, exclusive of interest and costs the sum or value of two thousand dollars.

The local prejudice clause under which said cause was removed, states, not that the State Court may remove it, nor that the Circuit Court may remove it, or that it may be removed upon the petition of the defendant, but that "*the defendant may remove it*," &c.

It was in view of the various opinions expressed upon the method of removal in the decisions theretofore made that led the attorneys for the petitioner to take the several steps set forth in the petitions to this Court, and in the returns of the learned judges thereto, in order to meet every possible objection as to method.

Their purpose and effect were stated in the following brief,

which was used upon the hearing before Judge Wallace, and which at his suggestion and direction was printed and served upon the plaintiffs and their attorneys, and a copy furnished to Judge Wallace and Judge Shipman, on the 28th day of April, 1890, and in the light of which the learned judges no doubt desire their returns to be construed:

ALBERTO T. RORABACK
vs.
THE PENNSYLVANIA CO.
SAMUEL A. HERMANN
vs.
THE PENNSYLVANIA CO.

United States Circuit Court,
For the District of Connecticut,
in the Second Circuit.
Fourth Tuesday of April, 1890.

Hon. WM. J. WALLACE, Judge Presiding.

Motion to Remand.

Brief for the Pennsylvania Company, Defendant, Opposing said Motions.

These cases were originally commenced in the Court of Common Pleas for Litchfield County, Connecticut, the plaintiff in each being a citizen of the State of Connecticut, and the defendant being a citizen of the State of Pennsylvania.

Before the trial of said cases, the defendant made and filed in each case in the State Court, a petition for its removal to this Court, on the ground of prejudice and local influence, and at the time of filing said petitions, it made and filed in each case, an affidavit, made by a special agent of said defendant corporation, stating that it had reason to believe and did believe, that from prejudice and local influence, the defendant would not be able to obtain justice in said State Court, nor in any other State Court, to which it had, under the laws of the State of Connecticut, the right, on account of such prejudice and local influence, to remove said cause; and further stating positively, that the defendant would not be able to obtain justice in said State Courts, on account of such prejudice and lo-

cal influence. At the same time it offered a bond, with good and sufficient surety, in each case, for entering in this Court, on the first day of its session, copies of all process, pleadings, etc. The Court thereupon, after hearing had, accepted the bonds, and granted an order in each case, directing its transfer to this Court. At the opening of this Court, on the first day of its session, the defendant duly entered said copies, and at the same time filed in this Court, in each case, a petition addressed to this Court, setting forth all the steps already taken for the removal of said cause, and further stating, that by reason of prejudice and local influence, the defendant would not be able to obtain justice in the State Courts, and praying this Court to remove said case, if it had not been removed by the steps already taken, and to take jurisdiction of the case. At the same time the defendant filed in this Court, in each case, an affidavit made by a special agent of the defendant, stating that he believed, that from prejudice and local influence, the defendant would not be able to obtain justice in said State Courts, and further stating positively, that from prejudice and local influence, the defendant would not be able to obtain justice in said State Courts; and further setting forth facts, which show the existence of such prejudice and local influence.

The plaintiff in each case now makes a motion to remand it to the State Court, on the ground that the amount in controversy is $500 exclusive of interest and costs, and on the ground that no such prejudice or local influence exists.

We believe that according to any and every construction that has been put upon the act of 1887 by federal judges, we have made it to appear to this Court that from prejudice and local influence the defendant will not be able to obtain justice in said courts, and that we have fully complied with all the formalities requisite to secure their removal, according to the various methods pointed out in the following cases:

Hills vs. Richmond & D. R. R. Co. 33 Fed. Rep. 81.
Huskins vs. Railway Co. 37 Fed. Rep. 504.
Whelan vs. New York, L. E. & W. R. Co. 35 Fed. Rep. 849.
Amy vs. Manning, 38 Fed. Rep. 536, 868.
Dennison vs. Brown, 38 Fed. Rep. 535.

The only other question we care to discuss is the one relating to the amount involved.

We insist that under the local prejudice clause of the act of 1887, no sum in dollars and cents is required, to give this Court jurisdiction.

This appears to be an open question in this circuit, no decision having been reported that we can find.

In the other circuits contradictory decisions have been made.

We respectfully suggest that the weight of authority as well as of reasoning supports the construction of the act for which we contend.

McDermott vs. Chicago & N. W. Ry. Co. 38 Fed. Rep. 529.
Fales vs. Chicago, Mil. & St. P. Ry. Co. 32 Fed. Rep. 673.
Whelan vs. N. Y., L. E. & W. R. Co. 35 Fed. R. 854.
Huskins vs. Cincinnati Ry. Co. 37 Fed. Rep. 507.
Speer Removal Causes, 62.
Minnick vs. Union Ins. Co. 40 Fed. Rep. 369.

THE PENNSYLVANIA COMPANY,
By DAVENPORT & O'HARA,
its Attorneys.

Light may perhaps be thrown upon the meaning of the words, "when it shall be made to appear to the Circuit Court," &c., by a reference to the history of the fourth clause of the second section of the Act in its passage through Congress.

The original Act was before both the 48th and 49th Congresses, and the fourth clause thereof when first introduced was as follows: "And where a suit is now pending, or may be hereafter brought, in any State Court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, such citizen of another State,

whether he be plaintiff or defendant, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, *by filing an affidavit in such State Court, setting forth that he has reason to believe and does believe* that from prejudice or local influence he will not be able to obtain justice in such State Court."

On February 5, 1884, the House Committee on the Judiciary reported back the bill with the following proposed amendment, "Strike out all after the word 'thereof,' in line 80, down to the word 'that' in line 82, and insert the following, 'when it shall be made to appear to the satisfaction of the Court.' The committee on the very next page of its report proceeded to give its own contemporaneous exposition of the language which it proposed to insert: "The committee, however, believe that when a plaintiff makes affidavit, that from prejudice or local influence he believes that he will not be able to obtain justice in the State Court, he should have the right to remove the cause to the Federal Court. *The bill secures that right to a plaintiff*," pp. 1, 2, Rep. No. 196, vol. I, House Reports, 48th Congress, 1st Session.

The suggested amendment thus interpreted by its proposers was inserted in the bill which passed the House, Jan. 13, 1887, in these words: "And where a suit is now pending or may be hereafter brought in any State Court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, such citizen of another State, whether he be plaintiff or defendant, may remove such suit into the Circuit Court of the United States at any time before the trial thereof, *when it shall be made to appear to the satisfaction of the Court* that from prejudice and local influence he will not be able to obtain justice in said State Court."—Vol. 18, Cong. Rec. 613.

When the bill thus amended came up in the Senate, it was was amended by striking out the words, "whether he be plaintiff or defendant," and by inserting the words, "any defendant being," and by striking out the word "satisfaction," and by in-

serting the words "said circuit," so that the same read, "any defendant being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district; when it shall be made to appear to said Circuit Court that from prejudice and local influence he will not be able to obtain justice in such State Court," and by adding to the clause these words, "or in any other State Court to which the said defendant may under the laws of the State have the right, on account of such prejudice or local influence to remove the cause; provided, that if it further appear that said suit can be fully and justly determined as to the other defendants in the State Court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remauded, so far as relates to such other defendants, to the State Court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any Circnit Court or may be hereafter entered therein, and which has been removed to said Court from a State Court, on the affidavit of any party plaintiff, that he has reason to believe and does believe, that from prejudice or local influence he was unable to obtain justice in said State Court, the Circuit Court shall, on the application of the other party, examine into the truth of said affidavit and the grounds thereof, and unless it shall appear to the satisfaction of said Court, that said party will not be able to obtain justice in such State Court, it shall cause the same to be remanded thereto."

The bill thus amended became a law in the present form.

Vol. 18, Cong. Rec. 2542.

Mr. Justice Brewer in *Short vs. Chicago, Mil. & St. P. R'way Co. 34 Fed. Rep. 227*, says: "Under the local prejudice clause no petition need be filed; all that is required is that it shall be made to appear to the Circuit Court that from prejudice or local influence the party will not be able to obtain justice in such State Court; and this showing may be made by affidavit, and if this contains a specific averment, while it may not be

conclusive, it is *prima facie* evidence of the fact, *and throws the case into this Court*, leaving the other party to challenge its truth. There being no form, no proceedure prescribed, I think the Court in any particular case may prescribe a mode of proceedure or might lay down a general rule applicable to all cases."

The Honorable Howell E. Jackson, the Circuit Judge of the Sixth Circuit, was a member of the Senate at the time of the passage of the Act.

In the case of *Whelan vs. New York, L. E. & W. R. R. 35 Fed. R. p. 860, et seq.*, in interpreting that part of the Act of 1887, that distinguished judge says:

"It is further contended that no proper procedings have been had or taken by the defendant, even conceding its right of removal, to effect such removal. By the third section of the Act of 1887, the steps required to be taken in removal cases generally are indicated, but that section excepts from its operation cases sought to be removed on the ground of local prejudice, in respect to which clause 4 of amended section 2 prescribes no mode or method of effecting that class of removals. What proceedure may, then, be adopted by the party seeking or enentitled to remove under this clause? In conferring the right Congress certainly intended that some process for its exercise should be within the reach of the party so entitled. We think the method or proceedure for effectuating the right so conferred by said clause may be found in the two paragraphs of section 639, Rev. Stat., which succeed the third subdivision of said section. These two paragraphs prescribing the method of accomplishing removals are not in conflict with the Act of 1887, and may therefore be considered as still in force, and as furnishing the proper and appropriate remedy to be employed by the party seeking a removal, and in making it to appear to said Circuit Court that from prejudice or local inflence he will not be able to obtain justice in the State Courts. It is not indicated in the Act of 1887, how, or in what manner, the fact

that the removing party cannot obtain justice in the local courts on account of such prejudice or local influence shall be 'made to appear' to the Circuit Court.

Judge Deady in *Fisk vs. Henarie, 32 Fed. Rep. 417–421*, held that the last clause of section 639 Rev. Stat., which immediately follows subdivision 3 of said section, might reasonably be looked to as furnishing the machinery for making it appear to the Circuit Court that the petitioning party could not obtain justice in the State Court because of prejudice or local influence. If this suggestion of that learned judge, in which I concur, is not deemed correct, then, in the absence of all provision as to the method or mode of presenting the application for removal, this Court would be left free to adopt proper and suitable rules, prescribing and regulating the practice in such cases; and such rules would naturally be made to conform to the practice and proceedure heretofore in force in like cases. In either view of the subject, we think the mode adopted by the defendant in this case is not open to any serious objection. A formal petition, properly sworn to, was duly presented to this Court, setting forth all the conditions required by the Act to enable said defendant to remove the suit. This petition was accompanied and supported by the affidavit of the proper officer of the defendant Company, stating, not what the affiant had reason to believe and did believe in respect to the existence of local prejudice, but in direct terms and in the very language of the Act, "that from prejudice and local influence said Railroad Company will not be able to obtain justice in said Courts of Common Pleas, or in any other State Court to which it has, under the laws of Ohio, the right, on account of such prejudice or local influence to remove said cause," etc. This made a *prima facie* showing as to what was required "to be made to appear to the Circuit Court."

But it is insisted on behalf of the plaintiff that this is not a sufficient showing to warrant this Court in declaring that said defendant was entitled to remove the suit and in assuming jurisdiction thereof. His counsel claim that the fact of prejudice

or local influence which must be made "to appear" to the Circuit Court as one of the conditions on which the right of removal depends, involves a judicial investigation; that there can be no *ex parte* action in the matter; and that in such cases the plaintiff is entitled to notice of the application and an opportunity to contest and put in issue the grounds on which the removal is sought. In other words, that he has the right under said provision of the Act, to make up an issue on the question of prejudice or local influence, and have this Court formally try that issue before determining whether it will sanction the removal and assume jurisdiction.

The plaintiff, as part of his motion to remand, denies the existence of such prejudice or local influence, and demands a trial of that issue. If he is entitled to have such a preliminary trial his motion to remand would, of course, have to await the result of that investigation, unless other grounds exist on which to rest the motion. It is conceded by the counsel for the plaintiff that by the old law and the practice under it, the State Courts to which applications for removal were addressed never entered or were authorized to enter upon such an investigation as he herein demands of this Court, before taking action thereon.

Under the third subdivision of section 639 Rev. Stat., based on the Act of March 2, 1867, amending the Act of July 27, 1866, the general statement made in the affidavit of the petitioners was considered sufficient, without any detailed setting forth of the facts which constituted the reasons of his belief. He was not required to prove these statements as facts, or affirmatively to show, except by the affidavit, that he could not obtain justice in the State Courts.

It was always held to be enough if, under oath, he stated the reasons which the statute assigned as the ground for removal. *Bowen vs. Chase, 7 Blatchf. 255.*

A party may always in proper way and time put in issue jurisdictional facts such as the citizenship of the opposing side, and rightfully demand trial thereon; but statutory requirements which form a part, even an indispensable part of the

process of removing a suit from State to Federal Courts, in any or all of the cases mentioned in the last or former acts of Congress, while they must be complied with in order to perfect the right to removal, are not to be confounded with jurisdictional facts on which a trial by proper pleadings may be demanded. The right to removal depends upon the statute giving the authority therefor and not upon the legislation which defines the original jurisdiction of the Circuit Courts of the United States, and should not therefore be restricted or limited by the latter legislation. *Green vs. Custard, 23 How. 484,* and *Bushnell vs. Kennedy, 9 Wall. 387.*

In conferring upon the Circuit Court of the United States the authority to act upon the application for removal of suits from State Courts, Congress certainly never intended to make the question as to the existence or non-existence of prejudice or local influence, which would prevent a non-resident citizen defendant from obtaining justice in the local courts, a jurisdictional fact such as would entitle the side opposing the removal to dispute its truth and put the matter in issue for formal trial.

The requirement of the statute that, under certain conditions therein stated, a party defendant may have the suit removed to this Court, "when it shall be made to appear to said Circuit Court, that from prejudice or local influence he will not be able to obtain justice in such State Court," constitutes nothing more than a part of the process of removing the suit. Steps forming a part of such process of removal under no previous statute, were ever regarded as issuable, and the subject matter of a preliminary trial before the application for removal could be properly acted upon. The distinction between jurisdictional facts, properly speaking, which may be made the subject of issue or trial, and model and formal requirements to the exercise of the right of removal, is clearly pointed out by Mr. Justice Bradley, speaking for the Court, in *Ayers vs. Watson, 113 U. S. 597, 598.* Model requirements and conditions prescribed by statute, in order to exercise the right of removal, may be waived, but ju-

risdictional facts proper cannot be. *French vs. Hay, 22 Wall. 238; Ayers vs. Watson, 113 U. S. 594; Railroad Co. vs. Hart, 114 U. S. 654; Railroad Rem. Cases, 115 U. S. 1..*

The construction which plaintiff's counsel contend should be placed upon this provision of the Act would be a radical departure from the judicial legislation of Congress since the foundation of the government and of the practice thereunder, and would involve on the part of this Court the exercise of the most unseemly and indelicate functions and duties, which could not fail to excite jealousies and create hostilities against the federal judiciary and disturb that comity and respectful consideration which should ever exist between the Courts of the United States. It is urged by plaintiff's counsel that the provision for removing the suit "when it shall be made to appear to said Circuit Court" are new words not previously used in any statute on this subject, and should be interpreted according to their common and usual signification; being evidently employed for the purpose (as contended) of requiring a finding by the Court upon evidence taken according to the form of law, and in such manner that both sides can be heard. This position, which is only a restatement of the proposition already noticed, assumes the question of local prejudice and the right to remove the suit therefor, is a proceeding between the parties to the action; that the right of removal involves a matter of controversy between the plaintiff and the defendant seeking such removal. This assumption is not well founded; neither is it correct, as claimed, that the words, "when it shall be made to appear to said Circuit Court," are so new and different from those previously employed in the legislation of Congress on the subject of removals as to indicate an intention to completely change the method and practice in effecting removals.

The twelfth section of the Judiciary Act of 1789 provided that "if a suit be commenced in a State Court against an alien, or by a citizen of another State, and the matter in dispute exceeds the aforesaid sum of $500, exclusive of costs, to be made to appear to the satisfaction of the Court," the defendant party

might, on entering his appearance, and by the process specified in the section, cause the suit to be removed "for trial to the next Circuit Court to be held in the district where the suit is pending."

While this section was in force Longest sued Gordon in the State Court of Kentucky. On entering his appearance, the defendant filed his petition to remove the cause to the Circuit Court of the United States for the District of Kentucky, on the ground that he was a citizen of Pennsylvania and the plaintiff a citizen of Kentncky. The citizenship of the parties, as alleged, was admitted; but the plaintiff resisted the removal, and the State Court refused to allow it, on the ground that "it did not appear to its satisfaction that the amount in controversy exceeded $500, exclusive of costs." The Supreme Court of the United States, in *Gordon vs. Longest, 16 Pet. 97*, held this action of the State Court erroneous. The plaintiff, in his declaration or petition, having laid his damages at $1000, the State Court could not properly go into a consideration of the amount involved in order to be satisfied that it exceeded $500, before allowing the prayer of the petition for removal.

Again, by section 643 Rev. Stat., embodying parts of Acts of Congress enacted in 1833, 1866 and 1871, relating to the removal of civil suits or criminal prosecutions commenced in State Courts against revenue officers of the United States, or against officers acting under the authority of federal election laws, it is provided, among other things (paragraph 7,) that if, upon the removal of such suit or prosecution, "it is made to appear to the Circuit Court," that no copy of the record and proceedings therein in the State Court," can be obtained, the Circuit Court may allow and require the plaintiff to proceed *de novo*, etc.

It would hardly be asserted that before the Circuit Court could require the plaintiff to proceed *de novo* under this provision of the statutes, that it would be required to enter upon a formal investigation or trial of the question whether a copy of the State record could be obtained. Under this section the

Circuit Court to which the defendant seeking the removal presents his petition in the first instance, decides every question relating to the sufficiency of the petition, affidavit and accompanying certificate, and its own jurisdiction in the matter. *Dennistoun vs. Draper, 5 Blatchford, 336.* And if the petition, upon its face, shows a case within the terms of the section, the suit or prosecution is *ipso facto* removed into the Circuit Court, and the jurisdiction of the State Court is at an end. It may be remarked, in passing, that this section, whose constitutionality was upheld in *Tennessee vs. Davis, 100 U. S. 257,* applied both to civil and criminal cases, and included any case that comes within its terms, without reference to the amount in dispute, if the suit be of a civil nature. *Wood vs. Matthews, 2 Blatchford, 370.* And the suit or prosecution, when actually removed from the State Court by the defendant officer, goes as a whole to the Circuit Court, with all the parties thereto. *Fisk vs. Railroad, 6 Blatchford, 362.*

It will be noticed that the fourth clause of the second amended section of the Act of 1887 has several features in common with this section of the Revised States. But again by section 5 of the Act of March 3, 1875, it is provided "that if in any suit commenced in the Circuit Court or removed from a State Court to a Circuit Court, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court," etc., it shall proceed no further therein, but shall dismiss or remand the same. Here the language is, "if it shall appear to the satisfaction of said Circuit Court" that certain jurisdictional facts are wanting, the Court is required to proceed no further; but these terms were never held to impose upon the Court the duty of trying any or all collateral facts or issues that could possibly be raised touching the steps or proceedings had in effecting removals, which fell short of the question of its actual jurisdiction.

By the fourth clause of amended section 2 of the Act of 1887 the removal is to be had "when it shall be made to appear to said Circuit Court" that such prejudice or local influence exists in the State Court or Courts, as shall prevent the petitioning defendant, being a citizen of a State other than that in which the suit is brought, from obtaining justice.

This certainly does not properly involve or require the investigation and judicial establishment of a fact which the plaintiff in the suit is given the right to controvert.

The statute makes no provision for giving notice to the plaintiff of the application to remove, and the petitioning party has not heretofore been required, either by the statute or the practice of the courts to which petitions for removal were addressed, to give any notice to the adverse party of his application for such removal of a suit from the State Court.

Wehl vs. Wald, 17 Blatchford, 342, and *Stevens vs. Richardson, 9 Fed. Rep. 194*, where it is said by Judge Blatchford that "it has always been held in this Court that no notice of the application for removal was necessary," citing *Fisk vs. Railroad Co. 8 Blatchford, 243*. No notice of the application for removal being required, it results necessarily that the Court which acts upon such application must proceed upon the *ex parte prima facie* showing made by the petition and affidavit accompanying the same, leaving to the adverse party the right to question by proper plea in the Circuit Court, the strictly jurisdictional facts presented in the application.

Barry vs. Edmunds, 116 U. S. 559, relied on by the plaintiff's counsel, is not in conflict with these propositions. In that case the Court does recognize that the jurisdictional facts embraced in section 5 of the Act of 1875, may, by proper pleading and at the proper time, be put in issue and a trial had thereon.

That section created certain new jurisdictional facts proper on which issue could be taken by the adverse party. But no such effect can be given to the requirement of the present law in designating the time and mode of removal.

Under this Act of 1887 the Circuit Court is invested with the authority heretofore conferred upon and exercised by the State Courts, in acting upon applications for removal, and has imposed upon it the further authority of directing the suit to be remanded, so far as relates to defendants other than the one applying for the removal, "when it appears" to said Court that said suit can be fully and justly determined as to such other defendants in the State Court, without being affected by local prejudice, and no party will be injured by a separation of the parties. Can it, with any show of propriety or reason, be asserted that this proviso to the fourth clause of said section contemplates a further or additional trial *inter partes* of the question, whether such separation of the parties shall be directed and the suit remanded as to some of the defendants and retained as to others? This language of the proviso "if it further appear" (to said Circuit Court,) indicates a judicial investigation and finding, just as much as the words used in the first part of the clause, "when it shall be made to appear to to said Circuit Court." The one no more implies a proceeding between the parties than the other; and it was clearly not the intention of Congress to require a preliminary trial of the question as to separating the parties and remanding the suit, so far as relates to some of the defendants; while retaining it as to others. Such a practice would involve innumerable collateral issues and lead to inextricable confusion in the due and orderly administration and disposition of the business of the Court."

Two questions remain for discussion:

First. Is an application to this Court for a mandamus the proper remedy, where the Circuit Court has remanded a cause removed to it, and declined to take jurisdiction of it, from a mistaken view of the law as to its jnrisdiction?

Second. Is the right to a removal of a cause under the local prejudice clause of the Act of March 3, 1887, dependent on the

amount involved, there being no provision relative thereto in such clause?

I.

Mandamus is the only and the proper remedy.

Mr. Justice Field, in his elaborate concurring opinion in *Virginia vs. Rives*, *100 U. S. 327*, thus expounds the law upon the power of this Court to issue writs of mandamus to inferior Courts.

"It is undoubtedly true, that except in cases where under the constitution this Court has original jurisdiction, the writ can be issued only in the exercise or in aid of its appellate authority. This was held as long ago as the case of Marbury vs. Madison, decided in 1803, and the doctrine has been adhered to ever since; for the obvious reason, that the jurisdiction of the Court being original in only a few enumerated cases, all exercise of power in other cases, must be in virtue of its appellate jurisdiction.

That jurisdiction may, however, be called into exercise in various ways. The term "appellate" in the constitution, is not used in a restricted sense, but in the broadest sense, as embracing the power to review and correct the proceedings of subordinate tribunals brought before it for examination, in the modes provided by law. Congress has prescribed the mode or process by which such proceedings shall be brought before the Court. In equity cases it is by a simple notice that an appeal is taken from the decree or proceeding sought to be reviewed; in common law cases it is generally by writ of error; in some cases it is by a writ of prohibition, and in some cases by that of *certiorari*, or of *mandamus*.

The mode is one resting entirely in the discretion of Congress. The Judiciary Act of 1789, passed at the first session of Congress after the adoption of the constitution, declared that the Supreme Court should have appellate power from the Circuit

Courts and from Courts of the several States in certain cases, and should "have power to issue writs of prohibition to the District Courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus* in cases warranted by the principles and usages of law, to any Courts appointed or persons holding office under the authority of the United States.

In Marbury vs. Madison it was held, that the authority given by the act to issue the writ of *mandamus* to public officers, was not warranted by the constitution, the Court observing that it was an essential criterion of appellate jurisdiction, that it revises and corrects proceedings in a case already instituted, and does not create the cause; and that although the writ might be directed to Courts, yet to issue it to an officer for the delivery of a paper, was in effect the same as to sustain an original action for the paper; and, therefore, seemed to belong not to appellate, but to original jurisdiction. The case in which this language was used, was an application to the Court to compel Mr. Madison, then Secretary of State, to deliver to Mr. Marbury, as Justice of the Peace, a commission which had been signed by President Adams, and transmitted to the predecessor in office of the Secretary, to be delivered to the appointee. There was, therefore, no action of an inferior tribunal brought up for review, the proceeding being merely to compel an executive officer to perform a ministerial act, in which a citizen was interested. The language must, therefore, be limited by the facts of the case. It was not intended to deny the authority of this Court to issue the writ to public officers, when the case is one in which it can exercise original jurisdiction; and probably to avoid such an inference the addition was made to the clause we have cited, which now appears in the Revised Statutes, so as to allow the writ to issue to public officers only "when a State or an ambassador or other public minister, or a consul or vice-consul is a party"—that is in cases where the Court has original jurisdiction. Indeed, it is only by such writ that

the original jurisdiction of this Court can, in many cases be exercised.

Commonwealth of Kentucky vs. Dennison, 24 How. 66.

Nor was the language intended to deny that this Court can issue the writ to judicial officers, where the object is to revise and correct their action, in legal proceedings pending in the Courts held by them.

Though the writ to a subordinate or inferior Court may be addressed to the Court as such, it is usually directed to the Judge thereof, or, if the Court is composed of several Judges, to such one or more of them as may be authorized to hold its sessions, or participate in holding them.

The reason assigned is, that in case of disobedience to the writ, the authority to enforce it is exercised over the Judges personally, who are vested with the power of exercising the functions of the Court.

High. Ex. Leg. Rem. 275.

In the present case, the writ is asked against the district Judge, who whilst holding the Circuit Court of the Western District of Virginia, made the order which is the subject of complaint, and who, if the writ be granted, will be able to hold that Court and carry out its command. There is no sound objection to its issue in this form.

The writ being one of the modes provided by Congress for the exercise of our appellate jurisdiction, the question whether it should be issued in this case is not difficult of solution, if, as contended by the commonwealth of Virginia, the Circuit Court in taking the prisoner from the custody of her authorities, transcended its jurisdiction. To review that action and set aside what was done under it, the writ is sought. The jurisdiction invoked is in its nature appellate; and there is no other mode provided for its exercise in the case at bar, than by the writ prayed. Though the petition is the first step taken by the commonwealth against the Judge, the proceeding is not on

that account an original suit. The petition is merely the process by which our appellate jurisdiction is invoked.

It is well settled that the writ of *mandamus* will issue to correct the action of subordinate or inferior Courts, or judicial officers, where they have exceeded their jurisdiction, and there is no other adequate remedy.

"It issues," says Blackstone, to the Judges of any inferior Court commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the Court of King's Bench, to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers, with which the Crown or the Legislature have invested them; and this not only by restraining their excesses, but also by quickening their negligence and obviating the denial of justice.--*3 Bl. Com. 110.*

It is in accordance, therefore, with the principles and usages of law, that this Court should issue a *mandamus* in the cases here enumerated, and thus supervise the proceedings of inferior Courts, where there is a legal right, and there is no existing legal remedy.

"It is upon this ground," says Mr. Justice Nelson, "that the remedy has been applied from an early day—indeed, since the organization of Courts and the admission of attorneys to practice therein, down to the present time—to correct the abuses of the inferior Courts in summary proceedings against their officers, and especially against the attorneys and counsellors of the Courts. The order disbarring them or subjecting them to fine or imprisonment, *is not reviewable by writ of error, it not being a judgment in the sense of the law for which this writ lies*, without therefore, the use of the writ of mandamus, however flagrant the wrong committed against these officers, they would be destitute of any redress." *Ex parte Bradley, 7 Wall. 364.* See, also, *ex parte Robinson, 19 id. 505.*"

The order remanding a cause is not a final judgment or decree, and hence it is settled by the decisions of this Court that a writ of error or appeal will not lie from such order under the Act of February 25, 1889.

Thouron vs. The Richmond & D. R. R. 134 U. S. 45.

The last paragraph of Section 5 of the Act of March 3, 1875, allowed a writ of error or appeal from such an order, but that paragraph is expressly repealed by the Act of 1887.

The defendant is therefore without remedy unless mandamus will lie.

It is an elementary rule that this Court may by writ of mandamus require the Circuit Court to decide a matter within its jurisdiction and pending before it for judicial determination, or of which from a mistaken view of the law it declines to take jurisdiction. This power was conferred upon this Court by the 13th section of the Judiciary Act of 1789, which gives it power to issue writs of mandamus to inferior courts of the United States according to the principles and usages of law.

This Court has repeatedly held that prior to the passage of the Act of 1875, mandamus would lie in case of such remanding order.

Turner vs. Farmers Loan & Trust Co. 106 U. S. 555.
Ex parte Bradstreet, 7 Pet. 647.
Ins. Co. vs. Comstock, 16 Wall. 270.
Railroad Co. vs. Wiswall, 23 Wallace, 507.
Babbit vs. Clark, 103 U. S. 609.
Ex parte Hoard, 105 U. S. 579.

The provision for writs of error or appeals in such cases made by the Act of March 3, 1875, did not operate to repeal that section of the Judiciary Act, but merely suspended it by rendering resort to it unnecessary, it being elementary law that mandamus will not lie when there is another remedy. Upon the repeal by the Act of 1887 of the clause of the Act of 1875, allowing such writs of error and appeals without any other remedy being provided, the suspended power again became operative.

There is nothing in the language of the second section of the Act of 1887 which can be construed as taking away or limiting the power of this Court to grant writs of mandamus in such cases—that in terms prohibits only the allowance of writs of error and appeals. The distinction between the remedy by mandamus and by writs of error and appeals in such cases had been too plainly marked by the many decisions of this Court upon the subject to permit the inference that by the specific mention of writs of error and appeals, Congress intended to anannul the power of this Court to grant writs of mandamus, which had always been derived from a distinct and independent section of the Judiciary Act. Indeed the special mention of writs of error and appeals negatives the idea that writs of mandamus were to be taken away.

If the Circuit Court has jurisdiction of said suits, the defendant under the laws of the United States has a clear legal right to have the controversy in each of them litigated in that Court, if the plaintiff therein shall choose to prosecute his suit. The defendant has a right to a trial in that Court of the issues presented by the pleadings and to a final judgment thereon. "And in all cases where a final judgment shall be rendered in a Circuit Court of the United States, in which there shall have been a question involving the jurisdiction of the Court, the party against whom the judgement is rendered shall be entitled

to a writ of error or appeal to the Supreme Court of the United States to review said judgment, without reference to the amount involved, but in cases where the judgment does not exceed five thousand dollars, the Supreme Court shall not review any question raised upon the record except such question of jurisdiction."—Act of February 25, 1889, 25 Stat. at Large, p. 693.

The petitions to this Court thus present cases for the exercise of its jurisdiction by mandamus, according to the principles and practice applicable thereto, provided such refusal of the Circuit Court of the United States to act further in the cases was based upon a mistaken view of the law as to its jurisdiction.

Ex parte Parker, 120 U. S. 743.
In re Hollon Parker, 131 U. S. 123.

II.

The right to a removal of a cause under the local prejudice clause of the Act of March 3, 1887, is not dependend on the amount involved, there being no provision relative thereto in such clause.

This question has been the subject of so much discussion in the Circuit Court resulting in such a contrariety of decisions by judges of the first rank, that its settlement by this Court has become a matter of great public importance.

Of the sixty odd Circuit Courts in the United States it is believed that fully one-half take jurisdiction of such cases where the matter in dispute is less than $2000 in amount. We know from the decisions in the Federal Reporter such to be the case in the seventeen districts comprising the 6th and 8th Circuits. Throughout those great circuits many such cases are now pend-

ing in the Circuit Courts upon removal proceedings had after the fullest discussion and consideration of the decisions of Mr. Justice Harlan and other judges to the contrary.

And in the late case of *Frishman vs. Ins. Co. 41 Fed. Reporter, 449*, Foster, Judge of the Kansas Circuit Court, says that Mr. Justice Brewer has held such cases removable.

The petitioner operates a line of railroad extending from Pittsburg to Chicago, and by means of its close relations and connections with other railroads, its cars and other property are sent in the service of the public into every State of the Union, under the protection of the constitution and laws of the United States. While there they are liable to be attached, and the petitioner made defendant in suits in the State Courts. The effect of the decision of the Circuit Court for the District of Connecticut in these cases, is to compel the petitioner in one part of the country to have its rights litigated in a tribunal where justice cannot be obtained by it, while under the same law and judicial system in exactly similar cases, an impartial tribunal is granted and secured to it in other parts.

The petitions to this Court show that each case remanded was literally within the terms of the local prejudice clause which is as follows:

"And where a suit is now pending or may be hereafter brought in any State Court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be

able to obtain justice in such State Court, or in any other State Court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause."

The petitions to this Court show that each of the remanded suits was a suit brought in the Court of Common Pleas for Litchfield County, in the State of Connecticut, a State Court, after the passage of the Act; that there was a controversy therein between the sole plaintiff, a citizen of the State in which the suit was brought, and the sole defendant, a citizen of another State, to wit: Pennsylvania; that the defendant therein, being such citizen of another State, removed such suit into the Circuit Court of the United States for the proper district at a time before the trial thereof, and when it had been by the defendant made to appear to said Circuit Court, that from prejudice and local influence it will not be able to obtain justice in such State Court, or in any other State Court to which the defendant, under the law of said State has the right on account of such prejudice or local influence, to remove said cause.

The petitions further show that the matter in dispute in each was $500 in amount and that the Circuit Court ordered the cases remanded because there was lacking in each an element not mentioned in said clause, to wit: a matter in dispute exceeding the sum of $2000.

To thus import into the local prejudice clause a limitation not in terms found therein, is by construction to convict Congress of a gross dereliction of duty. For it cannot be denied that it was the intention of the Constitution in extending the judicial power to controversies between citizens of different States, to secure to a defendant citizen of one State engaged in a legal controversy with a citizen of another State in the

courts of the latter, an impartial tribunal when none was afforded by the State. The power given to Congress to create such a Court was intended to be exercised whenever occasion arose. It must be remembered that the legislation embodied in the local prejudice clause of the Act of 1887, relates not to that class of cases where the bare facts of diverse citizenship and the amount involved raise a conclusive legal presumption that the State Court will be unfair to a non-resident defendant, nor yet to that other class of cases provided for in former acts now no longer in force, where the belief of the defendant as to the existence of the prejudice and his oath to that effect, established the presumption of unfairness, but to that class of cases where it can be made to appear to an impartial federal tribunal that, on account of prejudice and local influence, justice will be denied the defendant in the State Courts, and without the interposition of the federal court a trial must be a mockery. When, therefore, Congress found it necessary to legislate for the class of cases last mentioned, it was to be expected that it would provide for all of the class, for such was its duty, and when it has used without qualification language which aptly and clearly covers the whole class, the courts by construction should not restrict its meaning to a part.

"Where a law is expressed in plain, unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed and consequently no room is left for construction."

Lake County vs. Rollins, 130 U. S. 662.

Judge Wallace in remanding these cases referred to the opinion of Mr. Justice Harlan in *Malone vs. Rich. & D. R. R. 35 Fed. Rep. 625*, as containing his reasons, and every other decision on that side of the question has been made either in reliance upon the reasoning of that opinion or in deference to its authority.

We may justly, therefore, take that opinion as expressing all that can be said to support that construction of the clause.

Mr. Justice Harlan, after calling attention to the fact that in clauses 1 and 2 of Section 2 of the Act of 1887, the jurisdictional amount is the same as that required in Sec. 1, to give the Circuit Court original jurisdiction, proceeds to say (p. 627):

"It is, however, argued that as the clause which specifies prejudice or local influence as an additional ground of removal in suits between citizens of different States, makes no mention of the value of the matter in dispute, the presumption is that Congress intended to give the right of removal in cases of that kind without reference to such value. In this view I am unable to concur. The first clauses of section 2 describe as to their subject matter and the character of the parties, certain suits which may be removed from the State Courts to the Circuit Courts of the United States, and in the manner just indicated, attaches to the exercise of the right of removal the condition that the value of the matter in disput shall exceed a named amount. The subsequent clause, relating to prejudice and local influence, does not describe a new class of suits removable from the State Courts, but only specifies a distinct ground of removing one class of the suits previously defined, namely, that class in which there is a controversy between citizens of different States. And that ground the defendant is at liberty to set up at any time before the trial, whereas by the thirt section of the Act the right to remove upon any other ground will be lost if not exercised at the time or before the defendant is required by the laws of the State or the rule of the State Court in which the suit is brought 'to answer or plead to the declaration or complaint of the plaintiff.' The clause prescribing prejudice or local influence as ground for the removal of the suit, 'in which there is a controversy between a

citizen of the State in which the suit is brought and a citizen of another State,' cannot well be separated, in the process of interpretation, from the preceding clause in the same section, which by referring to the first section, requires as a condition of the removal of a suit because of diverse citizenship—the only kind of suit in which the existence of prejudice or local influence as affecting the right of removal is of any consequence —that the matter in dispute shall exceed in value $2000, exclusive of interest and costs. If in such suits having the required amount in dispute, it is made to appear to the Circuit Court that prejndice or local influence will prevent the defendant, who is a citizen of another State, from obtaining justice in the State Courts, then the right of removal may be exercised at any time before the trial."

Now it is to be noticed not only that no amount is specified in clause 4, relating to local prejudice cases, which is most significant when we see such extraordinary care taken to specify it in every other clause of the first three sections of the Act, but also that there is no express reference to the preceding clauses when in conformity to the particular method adopted in the structure of the Act, such careful reference was to be expected if any was intended. It is further noticable that the only other mention in the Act of the class of cases in clause 4 is in clause 1 of section 3, where they are treated as *sui generis*, "*except in such cases as are provided in the last clause of said section.*"

It may be farther remarked that if clause 2 of section 2 was intended to include local prejudice cases as a sub-class, and clause 4 was merely inserted to prescribe the time and method of the removal of that sub-class as distinguished from other sub-classes, it was most unnatural to put the provisions for their removal in section 2. We would naturally look for them in

section 3, where provision is made for the removal of the other sub-classes.

Again, notice the other differences in the clauses 2 and 4 of section 2. In clause 2 all the defendants must be *non-resident* citizens of other States, and must unite for the removal. In clause 4 *any* defendant citizen of another State may remove, whether resident or not. The time when the right of removal expires, and the method of removal, are different in the two classes of cases. Indeed there is no similarity between the two clauses, except that in both Congress excercised its constitutional power over controversies between citizens of different States and that both are in the same section, though in different parts separated by the very important clause relating to separable controversies, which has it own peculiar judicial history.

But there is no mistaking the difference in lineage between clause 4 of section 2 and the rest of the Act which precedes it. Clause 4 is a reenactment of the Act of 1867, modified in these respects: The right to remove is taken from the plaintiff and extended to any defendant; no amount is specified as the value of the matter in dispute; the defendant must make it appear to the Circuit Court that the prejudice exists not only in the Court where the suit is pending, but in every other State Court into which he has the rightt to remove it on account of such prejudice, and after removal the suit, as to the other defendants, may be remanded where they are not affected by such prejudice, no party will be prejudiced by such separation.

Section 1 and the first three clauses of section 2 of the Act of 1887, are a re-enactment of sections 1 and 2 of the Act of 1875, modified in these respects: The matter in dispute in some, perhaps in all, of the cases specified in sections 1 and 2 of the Act of 1875, is raised from $500 to $2000 in amount; the

plaintiff can bring suit in the cases mentioned in section 1 only in the district where the defendant is an inhabitant, except in suits founded only on diverse citizenship, and then only in the district where the plaintiff or defendant resides, and in suits founded on assigned choses in action, the suit can be brought only in such district, if it could be brought there if it had not been assigned, except in cases of foreign bills of exchange and instruments made by a corporation and payable to bearer.

The right to remove in cases provided for in clause 1, of sect. 2, where a federal question is involved is limited to the defendants, and in the cases provided for in clause 2 of section 2, the right is limited to non-resident defendants.

Now the language of the first two clauses of section 2 of the Act of 1887, is not more general or comprehensive than that of section 2 of the Act of 1875, yet in *Hess vs. Reynolds, 113 U. S. 79*, this Court held that the class of cases provided for in the Act of 1867, was not embraced in the Act of 1875.

Bible Society vs. Grove, 101 U. S. 610.

Baltimore & Ohio R. R. vs. Bates, 119 U. S. 467.

That language, though broad enough to cover the local prejudice cases, was held not to include them, because it plainly had reference to the class of cases embraced in clauses 1 and 2 of section 2 of the Act of 1887, which had always been treated by this Court as distinct in origin, nature and history from the class of cases provided for in the Act of 1867, and in clause 4 of section 2 of the Act of 1887. The reasoning employed and the rule of construction adopted by Mr. Justice Harlan in Malone vs. Railroad, are directly the reverse of those of this Court in the cases above cited, and if he is right now the Court was wrong then.

We may well adopt the language of this Court, speaking through Mr. Justice Matthews in *Claflin vs. Insurance Co. 110 U. S. 92, 93*, where an analogous question was presented. "It was in contemplation of these previous statutes and of the judicial decisions construing them, that Congress passed the Act of 1875, giving to plaintiffs as well as defendants unrestrained liberty to remove the cases specified in the 2d section from a State Court to a Circuit Court, and we are bound to presume, in full view and upon consideration of the very inconveniences which are now relied upon as the ground for limiting the right of removal by force of the restrictive clauses in the first section of the act. In our opinion this is not admissible. We are bound to take the words of the law in their usual, ordinary, literal meaning, and to construe the two provisions in the different sections in the same sense which in previous statutes had uniformly been given them, and not invent a new application and relation of the clauses without any indication whatever of any intention on the part of Congress to that effect."

In view of the completeness of clause 4 as a statute in itself, defining and prescribing as it does, the whole system of removals on the ground of prejudice and local influence, without reference to the other classes of cases in the Act, it is to be regretted that Mr. Justice Harlan did not offer to support by argument his assertion that the local prejudice clause did not refer to another class of cases between citizens of different States than that embraced in clause 2 of section 2, and that the two clauses could not well be separated in the process of interpretation.

An argument might perhaps be drawn from the general purpose of the act to narrow the field of the Circuit Courts by raising the jurisdictional amount in most other cases to $2000, and in restricting the right of removal in every case to the defendant, except in suits between citizens of the same State, claiming title to land under grants from different States, as provided for

in section 3. But the force of this argument is completely destroyed when it is seen that in clause 4 the right of removal possessed by the refendant is enlarged beyond what it was before in local prejudice cases, by granting the right of removal to one of several defendants. If the supposition is that Congress had such an insane abhorrence of the federal courts that, instead of legislating to remove well-known defects in existing laws, its only object was to restrict the right of parties to have their cases litigated there, even though it should utterly deprive them of any fair trial, how is to be explained this deliberate enlargement of the defendant s right of removal in this very class of cases?

Mr. Justice Harlan goes on to say, "There is nothing in the previous legislation of Congress to justify a different interpretation of the Act of 1887, from the one the Court now gives. When the right of removal on the ground of prejudice or local influence was conferred by the Act of 1867 (14 St. 558), Congress attached the condition that the matter in dispute should exceed the sum of $500, the amount then required for the original jurisdiction of the Circuit Courts of the United States in suits between citizens of different States. That condition was continued in the Revised Statutes of the United States (section 639,) and there is nothing in recent legislation to warrant the conclusion that Congress intended to authorize the removal from a State Court of a civil suit or controversy between citizens of different States upon the ground of prejudice or local influence, when the same suit could not, because of the small value in dispute, have been brought in a Circuit Court of the United States."

It is far more to the purpose to inquire whether there was anything in the recent previous judicial history of the country to draw attention to defects existing in the previous legislation of Congress upon the subject, and to emphasize the importance of authorizing the removal from a State Court of a suit in which there is a controversy between citizens of different States upon

the ground of préjudice or local influence, irrespective of the pecuniary value of the matter in dispute.

It is well known that on two occasions at least while this Act was in preparation and while it was before Congress, events occurred which showed pointedly the absurdity of the law as it stood.

In 1883 began the celebrated litigation between Sarah Althea Hill and William Sharon, which attracted and kept the attention of the whole country for several years. As that litigation progressed, it was revealed to an astonished people that a suit for divorce could be instituted in a State Court by an adventuress, a citizen of the State where the suit was brought, against a citizen of another State, a man of great wealth, prominence and unpopularity, upon a pretended contract of marriage, and although such citizen of another State could prove to the satisfaction of an impartial tribunal that from prejudice against him and from the local influence of the woman and her allies, he would not be able to to obtain justice in the State Court, or in any other State Court to which he had the right, under the law of the State, on account of such prejudice and local influence, to remove the case, he could not remove it into an impartial federal court because there was not a matter in dispute therein of the value of $500. His honor, his dearest rights and those of his children, were involved in the result of the suit, yet he must submit to the judgment of an unfair tribunal. And for his protection it was necessary for the Circuit Court of the United States for that district to take the very advanced position that it had original jurisdiction of a suit in equity between the same parties, to compel the destruction of a forged paper relied upon to prove the marriage.

Again, at the October term, 1885, this Court in the case of *Kurtz vs. Moffit, 115 U. S. 494*, which attracted great public attention, held that though a habeas corpus proceeding is a civil suit, involving the most important of civil rights, yet if instituted in a State Court, between citizens of different States,

it could not be removed into the Circuit Court of the United States because the matter in dispute did not exceed the sum or value of $500.

It is difficult to believe that with this history before it, Congress in legislating upon the class of controversies between citizens of different States, when it could be shown as a fact to an impartial Circuit Court that from prejudice or local influence the defendant could not obtain justice in any State Court, and that a trial therein would be a mockery, intended to grant the right of removal only in cases involving a pecuniary matter in dispute of the value of $2000, and thus to perpetuate and even aggravate the existing defects of the law.

Judge Spear, in his work on Removal of Causes under the Act of March 3, 1887, p. 62, says:

"It is quite possible that in this far-reaching statute, Congress intended to correct the mischief pointed out in *Kurtz vs. Moffitt, 115 U. S. 498.* There it was held that before the suit could be removed it must have the money value fixed by the statute. Now if local prejudice is a ground of removal from the local court in any controversy between citizens of different States, there is no reason why it should not have the same effect in all controversies. Undeniably there is often much local excitement and prejudice on the trial of proceedings for divorce, habeas corpus or other suits where the matter in dispute cannot be estimated and ascertasned in money. The federal courts are not courts where non-residents have an undue advantage, and it is no injustice to residents to require them to litigate therein their controversies with citizens of other States."

In *Green vs. Custard, 23 How. 484, City of Lexington vs. Butler, 14 Wall. 282,* and *Claflin vs. Ins. Co. 110 U. S. 81,* this Court decided that jurisdiction by removal could be acquired by the Circuit Court in many cases which could not originally be brought in such Courts, and that the policy of legislation

has never been to put both upon the same basis. There is absolutely no ground for the assumption that Congress intended to restrict the right of removal in cases where it could be judicially established that a fair trial in the State Courts was impossible to such as might have been brought originally in the Circuit Court by the plaintiff.

From the Judiciary Act of 1789, down to and including the Act of 1887, express provision is made for the removal of many classes of cases without reference to the amount involved. Rev. Stat. secs. 641, 643, 644. Indeed, where the presumption is violent, that justice cannot be obtained in the State Courts, the pecuniary limit is in all cases dropped.

The plain truth seems to be that Congress, in legislating for cases between citizens of different States where local prejudice actually existed, considered that by compelling the plaintiff to abide by his selection of a forum, and the defendant to show to the Circuit Court that a prejudice or local influence would prevent his obtaining justice, not only in the State Court where the suit was brought, but also in any other State Court to which he had the right to remove it for that reason, it had done enough to relieve the Circuit Courts from the pressure of business from that class of cases, and intended to give any defendant in any such case a tribunal where his controversy with the plaintiff could be impartially litigated, without reference to pecuniary amount in dispute.

In conclusion we invite the careful attention of the Court to the admirable opinion of Judge Shiras in *McDermott vs. Chicago & N. W. Ry., 38 Fed. Rep. 529*, in which the construction of the Act for which we contend was completely vindicated, and *Whelan vs. New York R. R. 35 Fed. Rep. 854; Frishman vs. Ins. Co. 41 Fed. Rep. 448; Huskins vs. Cincinnati R. R. Co. 37 Fed. Rep. 507; Fales vs. Railway, 32 Fed. Rep. 674; Short vs. Chicago, M. & St. P. Ry. 33 Fed. Rep. 115*, to the same effect.

The property of the defendant, while on its passage through the State of Connecticut in the service of the public, was seized upon under process of that State, and the defendant was required to defend these suits in a court of said State under penalty of the loss of its property.

The defendant simply desires a fair trial in an impartial tribunal, and is willing to abide by the result. The State of Connecticut has not provided such a tribunal. Such a tribunal exists, however, under the laws of the United States, in the Circuit Court of the United States for the District of Connecticut, whose protection it has invoked. With elaborate formalities it has brought the cases before that Court, but the learned Judges thereof decline to hear and decide them from a mistaken view of the law.

Its only resort now is to this Court.

If it fails here, its hopes are destroyed, and it must submit itself to the hands of the spoiler.

On this occasion it may well employ the language once before addressed to this Court: *omnia alia perfugia bonorum, subsidia, concilia, auxilia, jura ceciderunt. Quem enim alium appellem? Quem obtester? Quem implorem? nisi hoc loco, nisi apud vos, nisi per vos, judices, salutem nostram, quae spe exigua extremaque pendet, tenuerimus; nihil est praeterea quo confugere possimus.*

Dated at Bridgeport, Nov. 27th, 1890.

DANIEL DAVENPORT,
WILLIAM H. O'HARA,
Counsel for the Pennsylvania Company, Petitioner.

Supreme Court of the United States.

October Term, 1890.

EX PARTE

IN RE

THE PENNSYLVANIA COMPANY,

PETITIONER.

TWO CASES.

BRIEF FOR PETITIONER.

DANIEL DAVENPORT,
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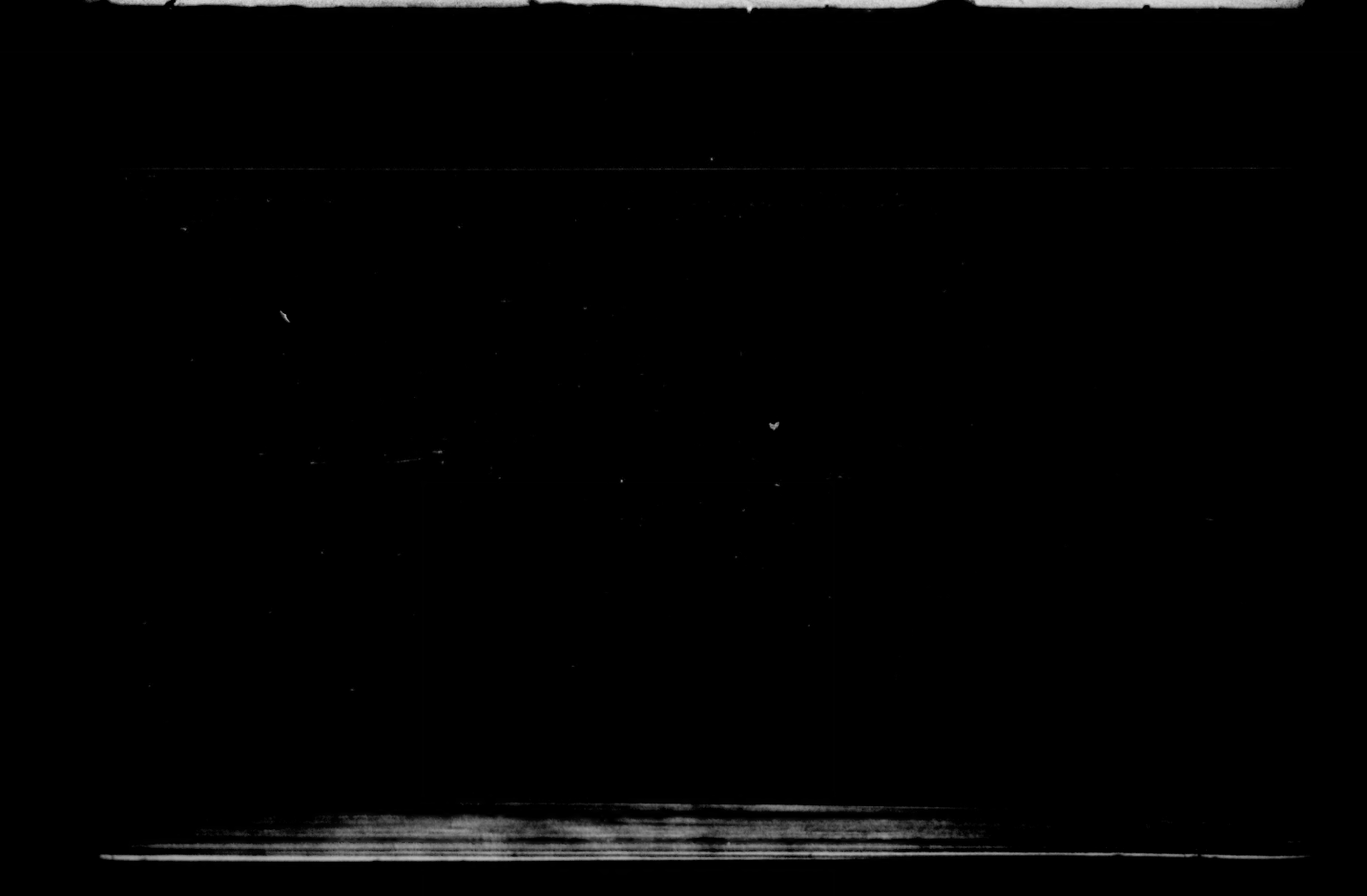
J. E. CROSWELL, PRINTER, SOUTH CAPITOL, WASHINGTON.



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THE PENNSYLVANIA COMPANY,

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ARGUMENT FOR PETITIONER.

These are petitions to this Court for writs of mandamus to compel the Circuit Court of the United States for the District of Connecticut to reinstate, take jurisdiction of, and proceed to try and adjudge according to the law and right of the cause, the cases of Alberto T. Roraback against The Pennsylvania Company, and of Samuel A. Hermann against The Pennsylvania Company, which have been removed to said Circuit Court from the Court of Common Pleas for Litchfield County, in the State of Connecticut, and have been ordered by said Circuit Court to be remanded to the State Court on the ground that the matter in dispute in each is less than $2000 in amount.

The cases had been removed under the fourth clause of the second section of the Act of Congress of March 3d, 1887, as corrected by the Act of August 13, 1888, better known as the "Local Prejudice Clause"

The matter in dispute in each was $500 in amount.

Two questions are presented by the petitions for discussion :

First. Is an application to this Court for a mandamus the proper remedy, where the Circuit Court has remanded a cause and declined to take jurisdiction of it, from a mistaken view of the law as to its jurisdiction ?

Second. Is the right to a removal of a cause under the local prejudice clause of the Act of March 3, 1887, dependent on the amount involved, there being no provision relative thereto in such clause ?

I.

Mandamus is the only and the proper remedy.

The order remanding a cause is not a final judgment or decree, and hence it is settled by the decisions of this Court that a writ of error or appeal will not lie from such order under the Act of February 25, 1889.

Thouron vs. The Richmond & D. R. R. 134 U. S. 45.

The last paragraph of Section 5 of the Act of March 3, 1875, allowed a writ of error or appeal from such an order, but that paragraph is expressly repealed by the Act of 1887.

The defendant is therefore without remedy unless mandamus will lie.

It is an elementary rule that this Court may by writ of mandamus require the Circuit Court to decide a matter within its jurisdiction and pending before it for judicial determination, or of which from a mistaken view of the law it declines to take jurisdiction. This power was conferred upon this Court by the 13th section of the Judiciary Act of 1789, which gives it power to issue writs of mandamus to inferior courts of the United States according to the principles and usages of law.

This Court has repeatedly held that prior to the passage of the Act of 1875, mandamus would lie in case of such remanding order.

Turner vs. Farmers Loan & Trust Co. 106 U. S. 555.
Ex parte Bradstreet, 7 Pet. 647.
Ins. Co. vs. Comstock, 16 Wall. 270.
Railroad Co. vs. Wiswall, 23 Wallace, 507.
Babbitt vs. Clark, 103 U. S. 609.

The provision for writs of error or appeals in such cases made by the Act of March 3, 1875, did not operate to repeal that section of the Judiciary Act, but merely suspended it by rendering resort to it unnecessary, it being elementary law that mandamus will not lie when there is another remedy. Upon the repeal by the Act of 1887 of the clause of the Act 1875, allowing such writs of error and appeals without any other remedy being provided, the suspended power again became operative.

There is nothing in the language of the second section of the Act of 1887 which can be construed as taking away or limiting the power of this Court to grant writs of mandamus in such cases—that in terms prohibits only the allowance of writs of error and appeals. The distinction between the remedy by mandamus and by writs of error and appeals in such cases had been too plainly marked by the many decisions of this Court upon the subject to permit the inference that by the specific mention of writs of error and appeals, Congress intended to annul the power of this Court to grant writs of mandamus, which had always been derived from a distinct and independent section of the Judiciary Act. Indeed the special mention of writs of error and appeals negatives the idea that writs of mandamus were to be taken away.

If the Circuit Courts has jurisdiction of said suits, the defendant under the laws of the United States has a clear legal right to have the controversy in each of them litigated in that Court, if the plaintiff therein shall choose to prosecute his suit.

The defendant has a right to a trial in that Court of the issues presented by the pleadings and to a final judgment thereon. "And in all cases where a final judgment shall be rendered in a Circuit Court of the United States, in which there shall have been a question involving the jurisdiction of the Court, the party against whom the judgment is rendered shall be entitled to a writ of error or appeal to the Supreme Court of the United States to review said judgment, without reference to the amount involved, but in cases where the judgment does not exceed five thousand dollars, the Supreme Court shall not review any question raised upon the record except such question of jurisdiction."—Act of February 25, 1889, 25 Stat. at Large, p. 693.

The petitions to this Court thus present cases for the exercise of its jurisdiction by mandamus, according to the principles and practice applicable thereto, provided such refusal of the Circuit Court of the United States to act further in the cases was based upon a mistaken view of the law as to its jurisdiction.

Ex parte Parker, 120 U. S. 743.
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II.

The right to a removal of a cause under the local prejudice clause of the Act of March 3, 1887, is not dependent on the amount involved, there being no provision relative thereto in such clause.

This question has been the subject of so much discussion in the Circuit Courts, resulting in such a contrariety of decisions by judges of the first rank, that its settlement by this Court has become a matter of great public importance.

Of the sixty odd Circuit Courts in the United States it is believed that fully one-half take jurisdiction of such cases where

the matter in dispute is less than $2000 in amount. We know from the decisions in the Federal Reporter such to be the case in the seventeen districts comprising the 6th and 8th Circuits. Throughout those great circuits many such cases are now pending in the Circuit Courts upon removal proceedings had after the fullest discussion and consideration of the decisions of Mr. Justice Harlan and other judges to the contrary.

And in the late case of *Frishman vs. Ins. Co. 41 Fed. Reporter, 449*, Foster, Judge of the Kansas Circuit Court, says that Mr. Justice Brewer has held such cases removable.

The petitioner operates a line of railroad extending from Pittsburg to Chicago, and by means of its close relations and connections with other railroads, its cars and other property are sent in the service of the public into every State of the Union, under the protection of the constitution and laws of the United States. While there they are liable to be attached, and the petitioner made defendant in suits in the State Courts. The effect of the decision of the Circuit Court for the District of Connecticut in these cases, is to compel the petitioner in one part of the country to have its rights litigated in a tribunal where justice cannot be obtained by it, while under the same law and judicial system in exactly similar cases, an impartial tribunal is granted and secured to it in other parts.

The petitions to this Court show that each case remanded was literally within the terms of the local prejudice clause which is as follows :

"And where a suit is now pending or may be hereafter brought in any State Court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Cir-

cuit Court that from prejudice or local influence he will not be able to obtain justice in such State Court, or in any other State Court to which the said defendant may, undnr the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause."

The petitions to this Court show that each of the remanded suits was a suit brought in the Court of Common Pleas for Litchfield County, in the State of Connecticut, a State Court, after the passage of the Act; that there was a controversy therein between the sole plaintiff, a citizen of the State in which the suit was brought, and the sole defendant, a citizen of another State, to wit: Pennsylvania; that the defendant therein, being such citizen of another State, removed such suit into the Circuit Court of the United States for the proper district at a time before the trial thereof, and when it had been by the defendant made to appear to said Circuit Court; that from prejudice and local influence it will not be able to obtain justice in such State Court, or in any other State Court to which the defendant, under the law of said State has the right on account of such prejudice or local influence, to remove said cause.

The petitions further show that the matter in dispute in each was $500 in amount and that the Circuit Court ordered the cases remanded because there was lacking in each an element not mentioned in said clause, to wit: a matter in dispute exceeding the sum of $2000.

To thus import into the local prejudice clause a limitation not in terms found therein, is by construction to convict Congress of a gross dereliction of duty. For it cannot be denied that it was the intention of the Constitution in extending the judicial power to controversies between citizens of different States, to secure to a defendant citizen of one State engaged in a legal controversy with a citizen of another State in the courts of the latter, an impartial tribunal when none was afforded by the State. The power given to Congress to create such

a Court was intended to be exercised whenever occasion arose It must be remembered that the legislation embodied in the local prejudice clause of the Act of 1887, relates not alone to that class of cases where the bare facts of diverse citizenship and the amount involved raise a conclusive legal presumption that the State Court will be unfair to a non-resident defendant, nor yet to that other class of cases provided for in former acts now no longer in force, where the belief of the defendant as to the existence of the prejudice and his oath to that effect, established the presumption of unfairness, but to that class of cases where it can be made to appear to an impartial federal tribunal that, on account of prejudice and local influence, justice will be denied the defendant in the State Courts, and without the interposition of the federal court a trial must be a mockery. When, therefore, Congress found it necessary to legislate for the class of cases last mentioned, it was to be expected that it would provide for all of the class, for such was its duty, and when it has used without qualification language which aptly and clearly covers the whole class, the courts by construction should not restrict its meaning to a part.

"Where a law is expressed in plain, unambiguous terms, whether those terms are general or limited, the legislation should be intended to mean what they have plainly expressed and consequently no room is left for construction."

Lake County vs. Rollins, 130 U. S. 662.

Judge Wallace in remanding these cases referred to the opinion of Mr. Justice Harlan in *Malone vs. Rich. & D. R. R. 35 Fed. Rep. 625*, as containing his reasons, and every other decision on that side of the question has been made either in reliance upon the reasoning of that opinion or in deference to its authority.

We may justly, therefore, take that opinion as expressing all that can be said to support that construction of the clause.

Mr. Justice Harlan, after calling attention to the fact that in clauses 1 and 2 of Section 2 of the Act of 1887, the jurisdictional amount is the same as that required in Sec. 1, to give

the Circuit Court original jurisdiction, proceeds to say (p. 627):

"It is, however, argued that as the clause which specifies prejudice or local influence as an additional ground of removal in suits between citizens of different States, makes no mention of the value of the matter in dispute, the presumption is that Congress intended to give the right of removal in cases of that kind without reference to such value. In this view I am unable to concur. The first clauses of section 2 describe as to their subject matter and the character of the parties, certain suits which may be removed from the State Courts to the Circuit Courts of the United States, and in the manner just indicated, attaches to the exercise of the right of removal the condition that the value of the matter in dispute shall exceed a named amount. The subsequent clause, relating to prejudice and local influence, does not describe a new class of suits removable from the State Courts, but only specifies a distinct ground of removing one class of the suits previously defined, namely, that class in which there is a controversy between citizens of different States. And that ground the defendant is at liberty to set up at any time before the trial, whereas by the third section of the Act the right to remove upon any other ground will be lost if not exercised at the time or before the defendant is required by the laws of the State or the rule of the State Court in which the suit is brought 'to answer or plead to the declaration or complaint of the plaintiff.' The clause prescribing prejudice or local influence as ground for the removal of the suit, 'in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State,' cannot well be separated, in the process of interpretation, from the preceding clause in the same section, which by referring to the first section, requires as a condition of the removal of a suit because of diverse citizenship—the only kind of suit in which the existence of prejudice or local influence as affecting the right of removal is of any consequence—that the matter in dispute shall exceed in value $3000, exclusive of interest and costs. If in such suits having the re-

quired amount in dispute, it is made to appear to the Circuit Court that prejudice or local influence will prevent the defendant, who is a citizen of another State, from obtaining justice in the State Courts, then the right of removal may be exercised at any time before the trial."

Now it is to be noticed not only that no amount is specified in clause 4, relating to local prejudice cases, which is most significant when we see such extraordinary care taken to specify it in every other clause of the first three sections of the Act, but also that there is no express reference to the preceding clauses when in conformity to the particular method adopted in the structure of the Act, such careful reference was to be expected if any was intended. It is further noticeable that the only other mention in the Act of the class of cases in clause 4 is in clause 1 of section 3, where they are treated as *sui generis*, "*except in such cases as are provided in the last clause of said section.*"

It may be farther remarked that if clause 2 of section 2 was intended to include local prejudice cases as a sub-class, and clause 4 was merely inserted to prescribe the time and method of the removal of that sub-class as distinguished from other sub classes, it was most unnatural to put the provisions for their removal in section 2. We would naturally look for them in section 3, where provision is made for the removal of the other sub-classes.

Again, notice the other differences in the clauses 2 and 4 of section 2. In clause 2 all the defendants must be *non-resident* citizens of other States, and must unite for the removal. In clause 4 *any* defendant citizen of another State may remove, whether resident or not. The time when the right of removal expires, and the method of removal, are different in the two classes of cases. Indeed there is no similarity between the two clauses, except that in both Congress exercised its constitutional power over controversies between citizens of different States and that both are in the same section, though in different parts

separated by the very important clause relating to separable controversies, which has its own peculiar judicial history.

But there is no mistaking the difference in lineage between clause 4 of section 2 and the rest of the Act which precedes it.

Clause 4 is a reenactment of the Act of 1867, modified in these respects: The right to remove is taken from the plaintiff and extended to any defendant; no amount is specified as the value of the matter in dispute; the defendant must make it appear to the Circuit Court that the prejudice exists not only in the Court where the suit is pending, but in every other State Court into which he has the right to remove it on account of such prejudice, and after removal the suit, as to the other defendants, may be remanded where they are not affected by such prejudice, and no party will be prejudiced by such separation.

Section 1 and the first three clauses of section 2 of the Act of 1887, are a re-enactment of sections 1 and 2 of the Act of 1875, modified in these respects: The matter in dispute in some, perhaps in all, of the cases specified in sections 1 and 2 of the Act of 1875, is raised from $500 to $2000 in amount; the plaintiff can bring suit in the cases mentioned in section 1 only in the district where the defendant is an inhahitant, except in suits founded only on diverse citizenship, and then only in the district where the plaintiff or defendant resides, and in suits founded on assigned choses in action, the suit can be brought only in such district, if it could be brought there if it had not been assigned, except in cases of foreign bills of exchange and instruments made by a corporation and payable to bearer.

Now the language of the first two clauses of section 2 of the Act of 1887 is not more general or comprehensive than that of section 2 of the Act of 1875, yet in *Hess vs. Reynolds, 113 U.S. 79*, this Court held that the class of cases provided for in the Act of 1867 was not embraced in the Act of 1875.

Bible Society vs. Grove, 101 U. S. 610.

Baltimore & Ohio R. R. vs. Bates, 119 U. S. 467.

That language though broad enough to cover the local prejudice cases, was held not to include them, because it plainly had reference to the class of cases embraced in clauses 1 and 2 of section 2 of the Act of 1887, which had always been treated by this Court as distinct in origin, nature and history from the class of cases provided for in the Act of 1867, and in clause 4 of section 2 of the Act of 1887. The reasoning employed and the rule of construction adopted by Mr. Justice Harlan in Malone vs. Railroad, are directly the reverse of those of this Court in the cases above cited, and if he is right now the Court was wrong then.

We may well adopt the language of this Court, speaking through Mr. Justice Matthews in *Claflin vs. Ins. Co. 110 U. S. 92, 93*, where an analogous question was presented. "It was in contemplation of these previous statutes and of the judicial decisions construing them that Congress passed the Act of 1875, giving to plaintiffs as well as defendants unrestrained liberty to remove the cases specified in the second section from a State Court to a Circuit Court, and we are bound to presume, in full view and upon consideration of the very inconveniences which are now relied upon as the ground for limiting the right of removal by force of the restrictive clauses in the first section of the act. In our opinion this is not admissible. We are bound to take the words of the law in their usual, ordinary, literal meaning, and to construe the two provisions in the different sections in the same sense which in previous statutes had uniformly been given them, and not invent a new application and relation of the clauses without any indication whatever of any intention on the part of Congress to that effect."

In view of the completeness of clause 4 as a statute in itself, defining and prescribing as it does, the whole system of removals on the ground of prejudice and local influence, without reference to the other classes of cases in the act, it is to be regretted that Mr. Justice Harlan did not offer to support by argument his assertion that the local prejudice clause did not re-

fer to another class of cases between citizens of different States than that embraced in clause 2 of section 2, and that the two clauses could not well be separated in the process of interpretation.

An argument might perhaps be drawn from the general purpose of the act to narrow the field of the Circuit Courts by raising the jurisdictional amount in all cases to $2000, and in restricting the right of removal in every case to the defendant, except in suits between citizens of the same State, claiming title to land under grants from different States, as provided for in section 3. But the force of this argument is completely destroyed when it is seen that in clause 4 the right of removal possessed by the defendant is enlarged beyond what it was before in local prejudice cases, by granting the right of removal to one of several defendants. If the supposition is that Congress had such an insane abhorrence of the federal courts that, instead of legislating to remove well known defects in existing laws, its only object was to restrict the right of parties to have their cases litigated there, even though it should utterly deprive them of any fair trial, how is to be explained this deliberate enlargement of the defendant's right of removal in this very class of cases?

Mr. Justice Harlan goes on to say, "There is nothing in the previous legislation of Congress to justify a different interpretation of the Act of 1887, from the one the Court now gives. When the right of removal on the ground of prejudice or local influence was conferred by the Act of 1867 (14 St. 558), Congress attached the condition that the matter in dispute should exceed the sum of $500, the amount then required for the original jurisdiction of the Circuit Courts of the United States in suits between citizens of different States. That condition was continued in the Revised Statutes of the United States (section 639,) and there is nothing in recent legislation to warrant the conclusion that Congress intended to authorize the removal from a State Court of a civil suit or controversy between citi-

zens of different States upon the ground of prejudice or local influence, when the same suit could not, because of the small value in dispute, have been brought in a Circuit Court of the United States."

It is far more to the purpose to inquire whether there was nothing in the recent previous judicial history of the country to draw attention to defects existing in the previous legislation of Congress upon the subject, and to emphasize the importance of authorizing the removal from a State Court of a suit in which there is a controversy between citizens of different States upon the ground of prejudice or local influence, irrespective of the pecuniary value of the matter in dispute.

It is well known that on two occasions at least while this Act was in preparation and while it was before Congress, events occurred which showed pointedly the absurdity of the law as it stood. In 1883 began the celebrated litigation between Sarah Althea Hill and William Sharon, which attracted and kept the attention of the whole country for several years. As that litigation progressed it was revealed to an astonished people that a suit for divorce could be instituted in a State Court by an adventuress, a citizen of the State where the suit was brought, against a citizen of another State, a man of great wealth, prominence and unpopularity, upon a pretended contract of marriage, and although such citizen of another State could prove to the satisfaction of an impartial tribunal that from prejudice against him and from the local influence of the woman and her allies, he would not be able to obtain justice in the State Court or in any other State Court to which he had the right, under the law of the State, on account of such prejudice and local influence, to remove the case, he could not remove it into an impartial federal court because there was not a matter in dispute therein of the value of $500. His honor, his dearest rights and those of his children, were involved in the result of the suit, yet he must submit to the judgment of an unfair tribunal. And for his protection it was necessary for the Circuit Court of the United States for that district to take the very advanced

In conclusion, we invite the careful attention of the Court to the admirable opinion of Judge Shiras in *McDermott vs. Chicago & N. W. Ry., 38 Fed. Rep. 529*, in which the construction of the Act for which we contend was completely vindicated, and *Whelan vs. New York R. R. 35 Fed. Rep. 854; Frishman vs. Ins. Co. 41 Fed. Rep. 448; Huskins vs. Cincinnati R. R. Co. 37 Fed. Rep. 507; Fales vs. Railway. 32 Fed. Rep. 674; Short vs. Chicago, M. & St. P. Qy. 33 Fed. Rep. 115*, to the same effect.

DANIEL DAVENPORT,
WILLIAM H. O'HARA,
Counsel for Petitioner.

In conclusion, we i
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Supreme Court of the United States,

OCTOBER TERM, 1890.

Ex Parte The Pennsylvania Co.

Petitions for Mandamus. Rules directed to the Judges of the Circuit Court of the United States for the District of Connecticut, to show cause why a Mandamus should not issue requiring them to take jurisdiction of and try the cases of Alberto T. Roraback vs. The Penn. Co., and Samuel A. Herman vs. The Penn. Co.

BRIEF OF MR. STANTON,

OF COUNSEL FOR RESPONDENTS.

FACTS.

On the 17th day of June, 1890, A. T. Roraback of Canaan, Litchfield County, Connecticut, and Samuel A. Herman of Winchester, in the same county, each brought his suit in the Court of Common Pleas for that county, against The Pennsylvania Company, a corporation organized under the laws

of the state of Pennsylvania. The complaint in each suit contains the common counts, and the demand laid at the end of the complaint is $500. In the case of Roraback the bill of particulars and also amendment to complaint filed in the cause each show a balance due of $500. In the case of Herman the bill of particulars and also the amendment to the complaint each show a balance of $481.25. The plaintiffs are attorneys at law and the suit in each case is brought to recover a debt alleged to be due for legal services and expenses.

At the March term, 1890, of said Court of Common Pleas, The Pennsylvania Co. filed its petition in that court in each case praying for a removal of the cause into the Circuit Court of the United States upon the ground of prejudice and local influence, and also filed therewith the affidavit of Joseph Wood its general manager, averring the existence of such prejudice and local influence against the defendant in these suits.

Each plaintiff thereupon filed in the Court of Common Pleas his remonstrance against the removal of the cause.

The Court of Common Pleas granted the prayer of the petition in each case and ordered the causes to be removed. Copies of the record were entered in the Circuit Court on the first day of its term holden at New Haven in the District of Connecticut, on the 4th Tuesday of April, 1890, and at the same time The Pennsylvania Co. filed in each cause in the Circuit Court its petition addressed to the latter tribunal, praying it to take jurisdiction and setting forth facts and circumstances tending to show the existence in the state court of prejudice and local influence against the defendant.

On the same day the plaintiff in each cause filed in the Circuit Court his motion to remand the cause to the state court, and these motions were heard before Hon. William J. Wallace the Circuit Judge. No inquiry was made into the truth of the averments of fact contained in said petitions

addressed to the Circuit Court and no evidence has been received upon the question of prejudice or local influence except the above named affidavit of the general manager. The question whether the causes should be remanded to the state court was tried solely on the plaintiffs motions to remand, which appear in the record.

The Circuit Court being of opinion that on account of the amount of the matter in dispute that tribunal has no jurisdiction over the causes, ordered them remanded to the state court.

The Pennsylvania Co. now makes application to this court for a mandamus directed to the judges of the Circuit Court requiring them to reinstate and take jurisdiction of the suits.

POINTS.

I.

As to mere common law actions to recover a debt, and not involving any federal matter or question, some limit of jurisdiction founded upon the amount of the matter in dispute has always been prescribed to the circuit court since the date of its organization.

That limit was prescribed in the Judiciary Act as follows:

"That the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party or the suit is between a citizen of the state where the suit is brought and a citizen of another state."

Act of Sept. 24, 1789. Statutes at large, Vol. 1, p. 78.

The 12th section provides for removals as follows:

"That if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall at the time of entering his appearance in such state court, file a petition for the removal of the cause, &c."

Statutes at large, Vol. 1, Page 79, Sec. 11.

No change has been made in the amount of the matter in dispute in these sections prescribed, and as to the class of actions now under consideration, unless by a recent act soon to be noticed.

Again congress placed on the statute book in 1867, an act providing for removals upon the ground of prejudice or local influence the material parts of which are as follows:

"That where a suit is now pending or may hereafter be brought in any state court in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars exclusive of costs, such citizen of another state whether he be plaintiff or defendant if he will make and file in such state court, an affidavit stating that he has reason to believe and does believe that, from prejudice or local influence he will not be able to obtain justice in such state court may at any time before the final hearing or trial of the suit file a petition in such state court for the removal of the suit, &c."

Act of March 2, 1867, Statutes at large, Vol. 14, 559.

This court has held that the above act of 1867, was not repealed by the later act of March 3, 1875, and it is now in force unless repealed by recent legislation.

Hess *vs.* Reynolds, 113 U. S. 73.

It is worthy of note that the matter in dispute in the cases on trial is even below the limitation contained in the act of 1867, for that limit must exceed five hundred dollars exclusive of costs, but in the Roraback case the demand and bill of particulars are for exactly five hundred dollars, and in the Herman case they are for $481.25.

Under the law of Connecticut the common counts amount in substance to one promise founded upon various considera-

tions, and the office of a bill of particulars is to limit the demand to the items and amount named in it.

Main *vs.* First School District, 18 Conn. 214.

Guile *vs.* Brown, 38 Conn. 237.

If under any possible construction of law, the limit contained in the act of 1867 has not been stricken out, still neither of these cases could, under that law, be removed.

II.

But it is said that all limitations founded upon the amount in dispute, have, as to cases of prejudice and local influence, been repealed by the act of 1887. That act was revised and corrected by the later one of 1888.

Act of March 3, 1887, Statutes, Vol. 24, 552.

Act of August 13, 1888, Statutes, Vol. 25, 433.

The material parts of the first and second sections are as follows:

Section 1. That the circuit courts of the United States shall have original cognizance concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum of or value of two thousand dollars, and arising under the constitution or laws of the United States or treaties made or which shall be made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states' citizens subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, etc.

Section 2. That the second section of said act (March 3, 1875) be and the same is hereby amended so as to read as follows:

That any suit of a civil nature at law or in equity arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending or which may hereafter be brought in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending or which may hereafter be brought in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

And where a suit is now pending or may be hereafter brought in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right on account of such prejudice or local influence to remove said cause; *provided*, that if it further appear that said suit

can be fully and justly determined as to the other defendants in the state court without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded so far as relates to such other defendants to the state court to be proceeded with therein.

At any time before the trial of any suit which is now pending in any circuit court, or may hereafter be entered therein and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence he was unable to obtain justice in said state court, the circuit court shall on application of the other party examine into the truth of said affidavit and the grounds thereof and unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such state court, it shall cause the same to be remanded thereto.

The court will observe that these suits were brought in the state court after the passage of the act of 1888, and after the second section above cited had been expressly declared to be merely an amendment of the second section of the act of March 3, 1875.

But that section of the act of 1875 carefully kept up the limit of amount exceeding five hundred dollars, exclusive of costs.

Act March 3, section 2, Statutes at Large, Vol. 18, 470 and 471.

In what manner, if at all, has this ancient limitation which appears in the acts of 1789, 1867 and 1875 been stricken from the statute book?

There are in the act of 1887 no words expressly repealing it. The provision is that "all laws and parts of laws in con-

flict with the provisions of this act be and the same are hereby repealed."

Now what provision of the act of 1887 stands in necessary conflict with the existence of that limit which is contained in that of 1867? How has that amount which "exceeds the sum of five hundred dollars, exclusive of costs," been taken out of the statutes?

If by any oversight the new act had been passed with no limitations as to amount, in any of the sections, would the court declare that all the ancient limitations are repealed?

I suggest that the only provision of the new act which will have the effect to work a repeal of this limitation is the one which fixes a new limitation. No other words in the act of 1887 appear to stand in necessary conflict with that part of the act of 1867 which fixes a limit as to amount of the matter in dispute.

No doubt a new act clearly intended to stand as a substitute for a former one and covering the entire subject matter, may work a repeal, even without a repealing clause.

But what substitute has been put in the place of that limitation as to amounts, which is found in the prejudice and local influence act of 1867? It appears to me that there is no such substitute adequate to work a repeal, except the enactment of the new limitation.

Again, the above parts of the first section of the act of 1887 specify certain classes of cases of a civil nature of which the circuit courts can take original jurisdiction concurrent with the courts of the several States.

Those parts of the first section are devoted wholly to that purpose, and not at all to the matter of removals.

The second section is devoted to the removal of causes and their remand to state courts. No purpose appears in the

second section to make any provision whatever for original jurisdiction. That subject has been exhausted in the first section. It is quite obvious that congress intended to keep the two subjects apart—treating one of them in the first section and the other in the second.

This is not to deny that mere removal clauses may confer jurisdiction. It is, however, to suggest that in this instance congress did not intend to confer any jurisdiction whatever by a mere removal clause.

Again, in the opening sentences of the second section, congress twice refers to removable cases as cases "of which the circuit courts of the United States are given jurisdiction by the preceding section," using this expression once in respect to federal cases, and once in respect to "any other suit of a civil nature at law or in equity, and which are now pending or which may hereafter be brought in any state court."

It has been held that these words restrict the right of removal to those in which the matter in dispute exceeds two thousand dollars, exclusive of interest and costs.

Malone *vs.* Richmond & D. R. R. Co., 35 Fed. Reporter, 625.

It is said that this is to interpolate something into the second section, and that the act extends to all federal controversies without regard to amount, to all suits, whether they can be estimated in dollars and cents.

McDermot *vs.* Chicago & N. W. Ry. Co. 38 Fed. Reporter, 529, p. 532.

Huskins *vs.* Cin., N. O. & T. P. R. R. Co., 37 Fed. Reporter, 504.

Whelan *vs.* N. Y., L. E, & W. Co., 35 Fed. Reporter, p. 854.

Frishman *vs.* Insurance Co., 41 Fed. Reporter, 449.

With great respect for these authorities, I suggest that they do not answer the reasoning found in the case of Malone *vs.* Richmond & D. R. R. Co., in the opinion given by Mr. Justice Harlan.

It is clear that the right of removal for the reason of prejudice and local influence is limited to suits involving controversies between citizens of different states; also that the right in such suits, where there is no federal question, now belongs only to the defendant who is a citizen, or defendants who are citizens of a state other than that in which the suit is brought.

"I think it was the intention of congress to place the right of removal for local prejudice upon the jurisdictional basis of all other removable controversies, discriminating in favor of the defendant only as to the time of making the application and permitting a single defendant to remove."

Per Wallace, Circuit Judge, Roraback *vs.* The Penn. Co., 42 Fed. Reporter, 420.

It is difficult to see any good ground for placing the right upon any other basis than as above indicated. I submit that the purpose to exclude small causes from the circuit court is clear, and that it is a leading purpose which dominates the act and is not to be disregarded in the fair construction of the law.

This view is greatly strengthened by the fact that the prejudice and local influence act of 1867 did contain a limitation as to amount, which was the same as that required for original jurisdiction.

Malone *vs.* Richmond & D. R. R. Co., 35 Fed. Reporter, pp. 627 and 628.

Carson Lumber Co. *vs.* Holtzclaw, 39 Fed. Reporter, 578.

The defendant under this clause has the right to apply for removal at any time before trial, and further, he may obtain a separation of the parties and obtain a removal as to himself.

Statutes, Vol. 25, p. 435, Sec. 2.

I suggest that congress intended no other distinctions in his favor than those pointed out in this section, and did not intend to admit his cause into the federal courts without regard to the amount involved.

To do this would go far to nullify the leading purpose of the act.

When congress undertakes to bestow jurisdiction regardless of amounts it employs language appropriate for that purpose.

Thus, a writ of error may be allowed to review any final judgment at law and an appeal allowed from any final decree in equity in certain cases "without regard to the sum or value in dispute."

Section 699, Revised Statutes.

Again cases arising under the Civil Rights Act, are declared to be reviewable by the Supreme Court "without regard to the sum in controversy."

Act of March 1, 1875, ~~Sec.~~ 18, Statutes at Large, 337.

Again the fiftieth congress, which passed the law now under discussion, has in the Act of Feb. 25, 1889, given to the Supreme Court of the United States, jurisdiction to review by writ of error or appeal certain causes "without reference to the amount of the same."

Act of Feb. 25, 1889, 25, Statutes at Large, 693.

III.

It is further submitted that even if the circuit court was in error as to the law point mentioned, still a mandamus ought not to be issued.

The peremptory writ must follow the alternative one. In order that the peremptory writ may issue the relator must show that he is entitled to the performance of all things specified.

High Ex. Legal Remedies, Section 548.
State *vs.* County Judge, 12, Iowa, 237.

If the law point be overruled, a question of fact at once comes to the front. The fact of prejudice and local influence has not "been made to appear" to the circuit court. Of course, mandamus ought not to issue requiring the judges to try the causes until they shall have found as a fact the existence of the prejudice to the extent pointed out in the act of congress. I am well aware that in some circuits the affidavit has been held not to be a jurisdictional matter, and that the existence or non-existence of prejudice and local influence is not a jurisdictional fact.

Fisk *vs.* Henarie, opinion of Deady J. 32, Fed. Reporter 417.
Whelan *vs.* N. Y., L. E. & W. R. R. Co. 35, Fed. Reporter 849.
Huskins *vs.* Cin. N. O. & T. P. R. R. Co. 37, Fed. Reporter 504.

But what is a jurisdictional fact? The petition for removal was filed long after the time for plea and answer had expired. All right of removal was gone unless the averment of prejudice and local influence could be made out. The case was below $2,000 in amount. There was no possibility

of a removal except under the prejudice and local influence clause.

Indeed although the fact does not appear by this record, one of the suits had already been tried in the state court and had reached the state supreme court, and is reported in the latest volume of its reports.

Roraback *vs.* the Penn. Co., 58, Conn. 292.
Decided Jan. 31, 1890.

If certain facts are absolutely necessary in order that jurisdiction may be conferred, are they not jurisdictional facts, and ought they not to be proved? They are the indispensable requisites without which no jurisdiction can be acquired.

The better view is that these averments are traversable in the circuit court and that they are to be proved by evidence.

Malone *vs.* Richmond & D. R. R. Co. 35, Fed. Reporter 625, see page 628.
Kaitel *vs.* Wylie, 38, Fed. Reporter 865, per Blodgett, J.
Southworth *vs.* Reid, 36, Fed. Reporter 451.
Denison *vs.* Brown, per Wallace, J., 38, Fed. Reporter 535.
Short *vs.* Chicago & St. P. R. R. Co., 34, Fed. Rep. 225.

A Connecticut statute makes ample provision for the removal to other counties if "the cause of justice requires it."

"*Section 970.* The judge holding the Superior Court or Court of Common Pleas in any county, may, if in his opinion the cause of justice requires it, upon motion, order any civil cause which has been put to the jury pending in said court, to be transferred to the same court in any other county: and thereupon the clerk of the court in which such action is pending, shall transmit to the clerk of the court to which such cause is transferred the original files and papers in said cause with a certificate of such transfer, who shall

enter said cause in the docket of said court to which it is so transferred, and said cause shall thereafter be proceeded with in the same manner as if it were originally brought to such court, &c."

Gen. Statutes Conn. Revision 1888, Section 970.

Where state laws make ample provision for change of venue, this fact furnishes a good reason for requiring further proof in the federal court, than a mere affidavit of prejudice and local influence.

Southworth *vs.* Reid, 36, Fed. Reporter 451.

Rike *vs.* Floyd, 42, Fed. Reporter 247.

There are four other counties in Connecticut besides Litchfield, to any one of which under the laws of the state these causes might be removed. These are the counties of Hartford, New Haven, Fairfield and New London.

Gen. Statutes Conn., Sections 722, 723 and 724.

The act of 1887, provides that as to cases pending at the date of its passage in the federal court or on their way into it, the court shall make the inquiry referred to upon the application of the party opposing the removal.

Why such an inquiry as to that class of cases and none as to future cases?

The contrast between the Act of 1867 and the one of 1887 is too plain to be overlooked. The first declares that if the party "will make and file in such state court an affidavit that he has reason to believe, and does believe that from prejudice or local influence he will not be able to obtain justice in such state court" he may have a removal.

14, Statutes, 559.

But the new act passed in 1887, declares that "it shall be made to appear to said circuit court" that from prejudice, &c.

The law is silent as the methods by which the fact shall be made to appear. But how is any fact to be made to appear to a court?

It appears to be the plain duty of the court to inquire and to take evidence upon the point, and its decision thereon is not to be coerced by mandamus.

IV.

Mandamus is not the proper remedy for the defendant in these cases. It is only to be issued "in cases warranted by the principles and usages of law."

Judiciary Act, Section 13, Statutes, Vol. 1, Page 80.
Section 688, R. S.

"Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court having jurisdiction of a case refuses to hear and decide the controversy or where such court having heard the cause refuses to render judgment or enter a decree in the case, but the principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate court in any case, nor will the writ be issued to direct what judgment or decree such court shall render in any pending case nor will the writ be issued if the party may have a remedy by writ of error or appeal, as the only office of the writ is to direct the performance of a ministerial act or to command the court to act in a case where the court has jurisdiction and refuses to act, but the supervising court will never prescribe what the decision of the subordinate court shall be nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy."

Ex parte Newman, 14, Wallace, 152.

"Of this decision the petitioners complain, and seek to have it reversed. This we cannot do by mandamus. Under that form of proceeding we may compel an inferior court to decide upon a matter within its jurisdiction and pending before it for judicial determination, but we cannot control its decision. Neither can we in that way compel the inferior court to reverse its decision which it has made in the exercise of its legitimate jurisdiction."

Ex parte Flippin, 94 U. S., 348.
In re, Sherman, 124 U. S., 364.
Ex parte Railway, 103 U. S., 794.

Mandamus is not to be employed for the purpose of the correction of errors.

Ex parte Newman, 14 Wallace, 169.

Undoubtedly the original defendants have no remedy by writ of error or appeal directly from the order to remand, since the passage of the act of 1887.

Morey *vs.* Lockhart, 123 U. S., 56.

Such an order is not a final judgment under the act of Feb. 25, 1889, 25 Statutes, 693.

Richmond & Danville R. R. Co. *vs.* Thouron, ~~118~~ 134 U. S., 45.

In such a case a defendant is not without remedy. He can in the state court object to the jurisdiction of that court. If judgment goes against him, he can appeal to the supreme court of the state. If that tribunal decides adversely to to him, he is entitled to his writ of error from this court to the highest court of the state in order to revise its decision in respect to any title, right or privilege which the defendant had set up under the statutes of the United States, and as to which he had suffered an adverse decision.

Revised Statutes, Section 709.
Chesapeake & Ohio R. R. *vs.* White, 111 U. S., 134.

Upon all the above points I respectfully contend—

First. That the decision of the circuit court upon the motions to remand was correct, because the matter in dispute in each case is less than two thousand dollars.

Second. That even if the decision upon the motions to remand be erroneous, still the circuit court had full jurisdiction over the question, and *mandamus* will not be issued in order to reverse such decision.

LEWIS E. STANTON, *Counsel for Respondents.*